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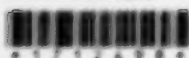
Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Human rights bodies and mechanisms

Global issue of unaccompanied migrant children and human rights

Final report of the Human Rights Council Advisory Committee

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I. Introduction

1. In its resolution 29/12, the Human Rights Council requested the Advisory Committee to develop a research-based study on the global issue of unaccompanied migrant children and adolescents and human rights, in which it would identify areas, reasons and cases where this issue arises in the world and the ways in which human rights are threatened and violated, and make recommendations for the protection of the human rights of members of this population, and to submit the report to the Council at its thirty-third session in September 2016.

2. The Advisory Committee submitted a progress report to the Council at its thirty-third session. At the fifteenth session of the Advisory Committee, it established a drafting group for the preparation of the study. The drafting group currently comprises Mario Luis Coriolano, Laura-Maria Crăciunean, Hoda Elsadda, Karla Hananía de Varela (Rapporteur), Obiora Chinedu Okafor, Katharina Pabel, Anatonía Reyes Prado (Chair) and Changrok Soh. The drafting group has had the technical support of Fabio Cano Gómez and the Rene Cassin foundation.

3. In the present report, the Advisory Committee aims to provide a comprehensive analysis of the situation of unaccompanied migrant children and adolescents from a human rights perspective, with the aim of assisting States in the fulfilment of their commitments under the Convention on the Rights of the Child and other related human rights treaties. It identifies areas of the world and cases where this issue arises, the reasons for them and the ways in which human rights are threatened and violated, recognizing best practices and making recommendations for the protection of the human rights of unaccompanied migrant children and adolescents.

4. The study is based on two methodological tools: documentary research and an ad hoc questionnaire addressed to States, national human rights institutions, non-governmental organizations (NGOs) and international organizations.

5. In preparing the study, the drafting group drew up questionnaires to seek the views and inputs of Member States, international and regional organizations, relevant special procedure mandate holders and treaty bodies, national human rights institutions, civil society organizations and other relevant stakeholders. A total of 61 responses to the questionnaires were received, comprising 14 responses from States, 36 from NGOs, 10 from national human rights institutions and one from the United Nations Children's Fund (UNICEF).

II. Main reasons that force or encourage children and adolescents into situations of unaccompanied migration in identified areas

6. Globally, in 2015, 15 per cent of all international migrants were under the age of 20 years. The proportion of young migrants was significantly higher in the developing regions (22 per cent) than in the developed regions (less than 10 per cent).¹ In the same year, children and adolescents constituted more than half of the total refugee population; and more than 100,000 asylum claims were lodged by unaccompanied or separated children.² Nearly one in three children and adolescents living outside their country of birth is a refugee; for adults, the proportion coming under the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) is less than 1 in 20.³ Unaccompanied migrant children and adolescents are a particularly vulnerable group because of their double

¹ United Nations, Department of Economic and Social Affairs, Population Division (2016), *International Migration Report 2015: Highlights*, p. 9.

² Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

³ UNICEF, *Uprooted: the Growing Crisis for Refugee and Migrant Children* (New York, 2016), p. 6.

status as minors, which requires special protection, and as migrants, which exposes them to all kinds of serious breaches of their fundamental rights.

7. According to the Convention on the Rights of the Child, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier. This definition of a child is the same in both regional and national contexts. In Africa, Europe and the inter-American system of human rights, a child is defined as a human being below the age of 18 years. The term "child" is therefore used throughout the present report to cover children and adolescents below that age. Children on the move and other children affected by migration shall be considered children first and foremost, and their best interests shall be the primary consideration in all actions concerning them.

8. According to the Committee on the Rights of the Child and the Inter-American Court of Human Rights, unaccompanied migrant children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so. The study covers unaccompanied children who find themselves outside their country of nationality or, if stateless, outside their country of habitual residence.

9. There are various categories of unaccompanied migrant children:

- (a) Children separated from their family or caregivers during the move;
- (b) Children who have started their journey as unaccompanied and separated children, but are currently travelling with groups of people;
- (c) Children who have interrupted their migration journey because of a lack of resources; in the context of the European migrant crisis, children in this group are often found in urban areas of Greece and Italy.

10. There are often important differences in motivation between migrant children who apply for asylum and those who do not. Children who seek asylum often flee their country from fear of persecution or because of generalized violence; fear is widespread and there is a profound sense of insecurity and impunity.⁴ Children who do not fall within the definition of an asylum seeker are often moved by the desire to find a place where their basic human rights, including special protection, can be met. Asylum seekers are covered by the Convention relating to the Status of Refugees and its Protocol, while migrant children are covered by international human rights law. However, while in transit, on reception and in destination countries, migrant children and child asylum seekers are exposed to the same risks and human rights violations. Migrant and refugee children have the same universal human rights, as stated in the New York Declaration for Refugees and Migrants.⁵

11. Information received from States shows that there are multiple causes for the migration of children, but they all have one factor in common. At the heart of the motivations for migration, there are multiple violations of the human rights of children in their countries of origin: lack of protection from various manifestations of violence, poverty, lack of opportunities, poor access to education and health services, ill-treatment at home and various kinds of threat, intimidation and insecurity.

12. Marginalized children are locked into a vicious cycle of exclusion, stigmatization and violence, since they start to be perceived as perpetrators themselves, feared by members of their communities and at times criminalized by the authorities.⁶ In a survey conducted by UNICEF in 2017 about migrant women and children in Libya, three quarters

⁴ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

⁵ The Declaration states (A/RES/71/1, para. 6) that, though their treatment is governed by separate legal frameworks, refugees and migrants have the same universal human rights and fundamental freedoms. They also face many common challenges and have similar vulnerabilities, including in the context of large movements.

⁶ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

of the migrant children interviewed said they had experienced violence, harassment or aggression at the hands of adults.⁷

13. In the case of migrants from the northern triangle of Central America, the level of education is insufficient to break the intergenerational transmission of poverty that constitutes a key factor in children's migration.⁸ Migrants living in low-income countries tend to be younger than in high-income countries.⁹ In Central America, an increasing number of young people are forced to migrate because of threats and violence.

14. In Colombia, there are many reports of teenagers who have left their places of origin because of violence and have never applied for refugee status. This phenomenon is also beginning to appear in some isolated cases in the Dominican Republic, where adolescents migrate because of violence and for economic reasons. In the case of children in the Plurinational State of Bolivia and Ecuador, the main motivation is economic. Cases of children who have migrated as a result of natural disasters are also reported, mainly in the case of Haiti.

15. Many countries stated that children have described irregular migration as a "necessary risk" since they feel they have to leave and hope to improve their situation by doing so. Studies of perceptions show that children see the authorities as an obstacle to reaching their destination; in very few cases are the authorities associated with an obligation to protect children's rights.¹⁰

16. According to interviews conducted with 10,166 unaccompanied migrant children in 2015 by the Social Welfare Department and the Attorney General's Office of Guatemala, 67 per cent travelled searching for work and 23 per cent for family reunification; 2 per cent were looking for better opportunities and 0.4 per cent did not give a reason. Only 0.1 per cent mentioned direct violence as the reason they moved.

17. In El Salvador, the returnees' care centre cared for 4,114 migrant children between June 2014 and July 2015, of whom 45 per cent were unaccompanied. When asked about their reasons for migrating, 36.1 per cent of the children replied that they wanted to join their families, 31.7 per cent mentioned better living conditions and 27.5 per cent were motivated by threats.¹¹ Violence has become a growing factor in migration in Central America. In Honduras, it has been reported that parents send their children abroad to prevent them from being recruited by gang members.¹²

18. There is a lack of strict criteria governing eligibility for regular channels of family reunification. In Europe, there are often minimum income requirements for adults who wish to sponsor their children for family reunification, which exclude low-income migrant workers and sometimes have a particularly discriminatory effect on migrant women. Despite the European Union-wide legislation on family reunification, there remain restrictions in some European Union member States in terms of the age of the child and the family members who are able to sponsor the child. Furthermore, some migrant workers are unable to apply for official family reunification because they do not have regular status as residents of the country of destination.¹³

19. The International Organization for Migration (IOM) estimates that 2.2 million people, of whom 1.5 million are children, have been displaced internally as a result of the conflict in north-eastern Nigeria, with nearly 400,000 Nigerian refugees and internally displaced people in neighbouring Chad, northern Cameroon and the Diffa region of the Niger. In Zimbabwe, which has seen a great increase in child migration flows in recent years, the main reported reasons for migration are: sexual abuse of children by caregivers,

⁷ UNICEF, "Migrants in Libya: insights into the experience of women and children in transit" (draft briefing paper) (New York, February 2017), p. 4.

⁸ Source: Directorate of Human Rights Research, Office of the Human Rights Advocate, Guatemala.

⁹ UNICEF, *Uprooted*, p. 6.

¹⁰ Source: Nicaragua — SOS Children's Villages International.

¹¹ Source: returnees' care centre, El Salvador.

¹² Source: Office of the National Commissioner for Human Rights, Honduras.

¹³ Source: Platform for International Cooperation on Undocumented Migrants.

peer pressure, death of the caregiver (mostly from HIV- and AIDS-related complications), breakdown of traditional family structures, public budgets that do not prioritize child rights, deteriorating education standards, high dropout rates from school and poverty.¹⁴

20. In the case of Senegal, when children agree to talk about the causes which drive them to migrate, they cite mainly economic reasons. Their parents have entrusted them to people who have promised to find them work in neighbouring regions or in other African countries. However, most are subjected to the worst forms of child labour.¹⁵

21. In West and Central Africa, migration is strongly influenced by the region's rapid population growth. Conflicts in the Central African Republic, the Democratic Republic of the Congo, Mali and Nigeria result in huge numbers of people being displaced, a large proportion of whom are children. Additionally, because of the high demand for a cheap and productive workforce, the informal sector and domestic work are areas where there is a high proportion of child labour working in exploitive conditions.

22. In Bangladesh, as in other Asian countries, there is a tradition of labour migration during the transition from childhood to adulthood. Children are urged to migrate as a rite of passage to adulthood, and often their families force them to leave and migrate in order to earn money for the household. Cultural norms and traditions contribute to children being trapped in poverty and this, in turn, increases their vulnerability to abuse and exploitation.¹⁶

III. Situation of unaccompanied migrant children and adolescents in identified areas

23. Unaccompanied migrant children separated from their families are the most vulnerable group among all migrants; the lack of information about their situation is one of the most important barriers experienced by institutions and States preventing effective protection of their rights.

24. Determining the migrant's age is the first step which the host State must take when caring for unaccompanied migrant children. Only minors can benefit from the specific protection granted by the Convention on the Rights of the Child. The host State should not seek to determine the young migrant's age by means of medical examinations and interviews unless he or she does not have identity documents to prove his or her age.¹⁷ In practice, a number of national authorities use medical tests combined with interviews to determine the migrant's age. Once minority is established, all unaccompanied and separated children have the right to be assisted by a legal guardian, to be hosted in a reception centre, and to receive legal assistance if they apply for asylum. Long delays in the appointment of legal guardians constitute a major obstacle to access to child protection mechanisms and family reunification.¹⁸

25. In several countries, child protection systems discriminate between children on the basis of their age, leaving older children to be cared for by the immigration authorities, who may be less well qualified or equipped to prevent all forms of violence against children and provide appropriate support for children who have suffered violence and exploitation to promote their full recovery and integration.¹⁹

26. Migratory policies based on detention and deportation have failed to discourage irregular migration. Usually, transit migrants travel via less well guarded and riskier areas. An increasing number of families are contacting traffickers in the hope that the entire

¹⁴ Information provided by Terre des Hommes, Zimbabwe.

¹⁵ Source: Caritas Senegal.

¹⁶ Source: Caritas Bangladesh.

¹⁷ A/HRC/15/29.

¹⁸ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

¹⁹ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

family will be able to leave, which may lead to the separation of children from their families, leaving children in most cases without any protection.

27. When it comes to denouncing a human rights violation, migrant children may lack proper documentation or not speak the local language. Mostly, they are simply too frightened to report an incident or to speak about the trauma they have endured. They fail to seek help, including medical assistance, for fear of a negative impact on pending decisions on their status or out of fear of arrest or deportation.²⁰

28. Despite the measures taken by the Central American States after the major inflows of Central American migrant children to North America in 2014, the phenomenon continues to grow. In 2015 and 2016 the number of children migrating unaccompanied or with their families increased, as did the number of deportations. According to IOM, the three countries to which the largest numbers of children are returned are El Salvador, Guatemala and Honduras. Increasingly, the children are younger, they are more frequently travelling alone, and the risks they face have increased.

29. Across the European Union, age determination procedures are frequently intrusive and unreliable, and unaccompanied children are often subjected to the same violations as undocumented adults. If they are apprehended, and particularly if they are not recognized as children, unaccompanied children can face detention,²¹ deportation, and violence.²² The authorities treat irregular entry as a criminal activity rather than as mere violation of administrative regulations. In practice, age determination is frequently carried out routinely, without respect for the dignity or rights of the child, and contrary to the principle that it should be a last resort.²³

30. In the first nine months of 2015, more than 200,000 children applied for asylum in European Union member States.²⁴ Some of them did not reach their destination. In the same year, nearly 700 children are believed to have died crossing the Mediterranean.²⁵ Approximately 700 children arrive daily in Europe, many of them exhausted and distressed and some in need of medical assistance.²⁶ In the former Yugoslav Republic of Macedonia, the number of unaccompanied children increased six-fold, from 932 in August 2015 to 5,676 in October of that year. In the first months of 2015, more than 3,000 unaccompanied migrant children applied for asylum in Sweden alone,²⁷ and more than 30,000 were expected to apply in Germany by the end of 2015.

31. Most countries in Mediterranean Europe act as both transit and destination countries for migrant flows. For example, in 2014, a total of 14,243 unaccompanied migrant children landed in Italy, of whom 3,707 absconded after landing and 10,536 were hosted in centres set up by local municipalities charged with providing reception services. According to IOM, between January and July 2015, a total of 5,459 unaccompanied migrant children entered the country, 27 per cent (1,467) of them from West Africa (the Gambia, Mali, Nigeria and Senegal). Of the 181,436 arrivals in Italy in 2016 via the central Mediterranean route, 28,223, or nearly 16 per cent, were children. Nine out of ten children who crossed the Mediterranean in 2016 were unaccompanied.²⁸

32. In some European countries, large numbers of children go missing from reception centres or disappear from the care of child protection facilities or immigration authorities;

²⁰ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

²¹ Pursuant to article 37 of the Convention on the Rights of the Child, migrant children should not be detained.

²² Source: the Platform for International Cooperation on Undocumented Migrants.

²³ Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

²⁴ Source: Eurostat.

²⁵ UNICEF, *Protecting Children on the Move: Briefing Paper* (Geneva, November 2015), p. 3.

²⁶ *Ibid.*, p. 4.

²⁷ Source: Swedish Migration Agency.

²⁸ UNICEF, *A Deadly Journey for Children: The Central Mediterranean Migration Route* (Geneva, February 2017), p. 2.

as many as 80 per cent have disappeared from reception centres. In the camp in the northern French town of Calais which was dismantled in October 2016, nearly one in three migrant children tracked by a refugee charity had gone missing.²⁹

33. In 2015, a total of 3,784 migrant deaths was recorded in the Mediterranean, 35 per cent of them of unknown origin, 33 per cent from sub-Saharan Africa and 9.5 per cent from the Horn of Africa.³⁰ While the total rates of migration are low, the proportion of children among African migrants is the largest for any region. Nearly one in three African migrants is a child, more than twice the global average.³¹

34. Mexico, situated in the middle of the biggest flow of migration in Latin America, is a country of origin, transit, destination and return of migrants. The Americas are home to 6.3 million child migrants, one fifth of the global total.³² The migrants are of Mexican origin intending to enter the United States of America or children of another nationality who enter Mexico as a country of destination or transit on their way to the United States. In recent years, the arrival and irregular movement of children in Mexico has increased enormously; they come mainly from Central American countries.³³ According to UNICEF Mexico, the number of unaccompanied migrant children who were detected by Mexican immigration authorities increased by a factor of 3.3 between 2013 and 2015.

35. In the United States, Customs and Border Protection officers and Border Patrol agents identify individuals as unaccompanied children. After processing the administrative case, they either transfer the child to an institution which will take care of him or her or, if permitted under the limited circumstances provided by law, arrange for the child's voluntary return. Migrant children should not be in the custody of Customs and Border Protection for more than 72 hours while they are assigned accommodation. However, they do stay in the custody of the Border Patrol for extended time periods in temporary locations and under conditions that affect their development and emotional health.³⁴

36. In 2015, migrant arrests in the United States declined, but the number of arrests and deportations from Mexico to Central America increased dramatically. This is due in some degree to pressure by the United States on Mexico.³⁵ Despite the decrease in arrests in the United States, repatriation is still common. In 2014, 14,352 repatriations of Mexican children were carried out by the United States. The corresponding figure from January to July 2015 is 6,772.³⁶

37. In Mexico, immigration authorities detain unaccompanied migrant children from Central America who are detected at points of entry and by migration interviews at rail and road mobile posts.³⁷ According to the Migration Act, the National Migration Institute should remove the children and accommodate them at the facilities of the National System for Integral Family Development. However, contrary to the amendment to article 29 of the Migration Act, children are detained for long and unpredictable periods after being apprehended by the immigration authorities.³⁸ The National Human Rights Commission of Mexico has found that, of 35 migrant holding centres, only 11 have areas for families and over 50 per cent lack specific spaces for the accommodation of children. Moreover, the

²⁹ Zoe Tabary, "One in three child migrants missing after Calais Jungle closure: charity", 23 November 2016. Available from: <http://www.reuters.com/article/us-europe-migrants-children-idUSKBN13J01Z>.

³⁰ Source: IOM, "Missing migrants: tracking deaths along migratory routes — Mediterranean". Available from <https://missingmigrants.iom.int/mediterranean> (accessed 20 July 2017).

³¹ UNICEF, *Uprooted: the Growing Crisis for Refugee and Migrant Children* (New York, 2016), p. 8.

³² *Ibid.*, p. 9.

³³ According to statistics from the National System for Integral Family Development, most children who are in transit or in an irregular migration situation in Mexico are adolescent males with basic education.

³⁴ Source: the Association of International Consultants and Advisers.

³⁵ Source: World Vision Latin America and the Caribbean.

³⁶ Source: Ministry of the Interior of Mexico.

³⁷ Mexico is not the only country that detains migrant children. The lack of statistics makes it difficult to know the number of detained children; however, it is estimated that over 100 countries detain children for immigration purposes. See <http://cndchilddetention.org/the-issue/>.

³⁸ Source: Congregation of Our Lady of Charity of the Good Shepherd, Mexico.

focus of migration policy in Mexico is the detention and return of irregular migrants, even in the case of unaccompanied children. From January 2014 to June 2015, 14,864 unaccompanied migrant children were returned to their countries of origin.³⁹

38. Other sources reveal that over 85 per cent of unaccompanied migrant children from Central America who enter Mexico are eventually deported. Mexico does not comply with the 2011 reforms of the Migration Act, including the requirement to consider the best interests of the child before repatriating migrants.⁴⁰

39. The massive number of child returnees and the lack of preparation for their reintegration is a serious issue in Central America. For instance, El Salvador reported a total of 7,545 child migrant returnees from Mexico in 2015, an increase of 4,944 from 2014; in the case of Guatemala, in the same year, there was a total of 9,613 minor returnees, with the country from which they were returned not specified.⁴¹

40. Some governments in Latin America have participated in special training and workshops on childhood, migration and human rights. Most migration offices have no personnel assigned exclusively to work with unaccompanied migrant children. There are almost no local authorities or institutions in the region that work specifically on this topic. Although legal frameworks to protect both migrants and children are well developed, there are no laws on unaccompanied migrant children as a specific category. Some countries, such as Nicaragua, do not have a migration policy at all, so the responses for the migrant population tend to be improvised, short-term and uncoordinated.⁴²

41. In Paraguay there is the phenomenon of *criadazgo* — the migration of children, often when very young, from rural areas to the cities, organized by contractors under the guise of protection. Children are put to domestic work without any financial compensation but receive shelter, food, clothing and education. According to the Permanent Household Survey, it is estimated that 46,993 children, or 2.5 per cent of all children in the country, are in this situation.⁴³

42. In Asia, the labour laws of some countries, such as India and Nepal, allow the exploitation of child workers by setting the age of adulthood at 14 years. As Caritas Bangladesh has reported, employers of children rarely consider the compensation they pay to child workers or their families as the fulfilment of duties to the children, nor do they see children as rights holders entitled to claim their rights to fair treatment and compensation.

43. India has the world's largest child population, and migration of children within states and across state boundaries is increasingly prevalent. Gender is often an issue in migration flows and human rights violations; in India, the main issue is gender discrimination and the low status of women in society, which lead to child marriage, declining female-to-male ratios and the demand for the traditional sexual division of labour. Female migrant children are increasingly used as service providers to fulfil the demand for a vast array of personalized services in the entertainment and sex industries, in domestic work and in the marriage market.⁴⁴

44. In South Africa, the number of irregular migrants is difficult to determine; estimates range between 2.5 million and 7 million. Every week, about 2,000 irregular migrants, mainly from Mozambique and Zimbabwe, are deported; 20 per cent of these are children.⁴⁵

45. According to the *UNICEF Eastern and Southern Africa Regional Analysis Report 2014*, the South Sudan crisis has led to the mobilization of almost half a million people. Over 70 per cent of these are children seeking asylum in neighbouring countries such as

³⁹ Source: Ministry of the Interior of Mexico.

⁴⁰ Source: Fray Matias de Córdova Human Rights Centre.

⁴¹ Source: ministries of foreign affairs of El Salvador and Guatemala.

⁴² Source: Nicaragua — SOS Children's Villages International.

⁴³ Source: Luna Nueva Group, as cited in the End Child Prostitution in Asian Tourism Paraguay replies to Advisory Committee questionnaire on unaccompanied migrant children and human rights.

⁴⁴ As the female-to-male ratio in India continues to fall, young girls are trafficked into the country and sold into marriage.

⁴⁵ Source: IOM, 2014 data.

Ethiopia, Kenya, the Sudan or Uganda. The number of unaccompanied children is estimated at 35,000.

46. Children in transit through Zimbabwe lack many social services. Once the children are outside the family environment, they are often left by themselves and may be exposed to difficult living conditions. However, reception conditions have improved in recent years, as child reception centres have been set up by the Government of Zimbabwe, IOM and UNICEF. These reception centres provide basic social services for children and allow for family reunification.

47. Inside Senegal, the phenomenon of *talibé* children is growing. These children are taken by marabouts (Qur'anic teachers) to cities for the alleged purpose of learning the Qur'an. However, in fact, the teachers exploit the children and force them to pay money. Studies show that 15,000 children without family in Dakar are victims of exploitation. In most cases, these children come from the southern regions or neighbouring countries such as Guinea-Bissau.⁴⁶

48. Haiti has no reception structures dedicated to children. Unaccompanied children are housed with repatriated adults in transit centres operated by the Government. In general, the centres do not meet the minimum standards for hygiene, water supply or appropriate food.⁴⁷

49. Between 1990 and 2015, the total number of child migrants in the Oceania region increased from 430,000 to 670,000, but overall migration rose faster, meaning that children now make up a slightly smaller proportion of the migrant population than they did 25 years ago.⁴⁸

IV. Main human rights violations faced by unaccompanied migrant children and adolescents in identified areas

50. A common denominator in almost every country is the lack of information about human rights violations faced by unaccompanied migrant children.

51. Specifically, the rights and principles under the Convention on the Rights of the Child that are regularly violated in the case of unaccompanied asylum-seeking children are the following: non-discrimination, best interests of the child, development, having a name and nationality, family reunification, respect for the views of the child, health and medical care, education; special protection measures.⁴⁹

52. Trafficking for sexual or economic exploitation, surgical removal of organs and other forms of violence are the most severe violations in the case of migrant children in Paraguay. In research published in 2015 by the Luna Nueva Group on sexual exploitation and trafficking of unaccompanied children in Paraguay, various kinds of violation were reported: sexual and labour exploitation, organ trafficking and trading girls for animals.

53. According to information dating from 2010 to 2012, human traffic flows originating from sub-Saharan Africa took place mostly within the region, with the majority of victims being children. The United Nations Office on Drugs and Crime reveals that Africa and the Middle East accounted for 62 per cent of the global total of trafficked children between 2010 and 2012, the highest proportion in the world.

54. In many countries of destination, migrant children commonly acquire a debt vis-à-vis the trafficker or exploiter, who takes away the children's documents and uses threats and violence to subdue them. Children are reported to be physically abused by both private

⁴⁶ Source: Caritas Senegal.

⁴⁷ Source: World Vision Haiti.

⁴⁸ UNICEF, *Uprooted*.

⁴⁹ International legal principles that prescribe the responsibilities of States towards unaccompanied children are derived from two main conventions: the Convention on the Rights of the Child and the Protocol relating to the Status of Refugees.

citizens and government officials, as in the case of unaccompanied Zimbabwean children in Botswana who have been introduced illegally into the country.⁵⁰

55. Unaccompanied migrant children in the Democratic Republic of the Congo are victims of labour exploitation in jobs that prevent them from going to school and do not provide medical care.⁵¹ According to UNICEF, there are approximately 40,000 children working in mines across the southern part of the country. Unaccompanied migrant children are sometimes arrested and held in adult prisons, as there are no juvenile prisons.⁵² In Malaysia, a State that does not recognize refugees and asylum seekers since it has not acceded to the Convention relating to the Status of Refugees, children are constantly harassed by law enforcement officers, and many have been captured and placed in immigration detention camps, where there is no differentiation between minors and adults.⁵³

56. In India, as in other countries in Asia, exploitation starts as soon as the children leave home. On their way to the cities, they are afraid of the police, fearing what will happen if they are caught. Agents take them to their agency and they are kept there until they are placed for work. There are also reports of physical and sexual abuse by agents and employers.⁵⁴ In Bangladesh, similar cases of abuse have also been reported.⁵⁵

57. The General Act on the Rights of Children and Adolescents in Mexico recognizes children as rights holders and guarantees them full exercise, respect, protection and promotion of human rights. They should therefore enjoy the fundamental rights to which they are entitled in their special capacity as persons in development, which are protected and embodied in international human rights instruments such as the Convention on the Rights of the Child. Despite these provisions of domestic and international law, however, there is a large gap between human rights treaties, domestic law and day-to-day practice.

58. In Chile, even children of migrants who were born in the country were formerly registered as stateless because they were considered as the sons and daughters of aliens in transit, owing to a biased interpretation of the Constitution. Currently this term can only be applied to tourists and members of ships' crews, since the children of migrants born in Chile are now considered Chilean. However, there are still reports of children being registered as the children of aliens in transit, which denies them access to a nationality or an official identity.⁵⁶

59. In some European States, such as Austria, children have to apply for asylum in order to receive basic services and immediate legal representation, which is provided at first by the legal adviser at the initial reception centre and subsequently by the provincial youth offices. More than twice as many children applied for asylum within the European Union and free movement zone in 2015 than in 2014; in the first half of 2016, nearly 70 per cent of children seeking asylum in the European Union and free movement zone were fleeing conflict in Afghanistan, Iraq or the Syrian Arab Republic.⁵⁷

60. In Guatemala, little has been done to enforce the right to freedom of opinion and expression of children; there are many obstacles to the fulfilment of this right, such as authoritarian attitudes among adults.⁵⁸ Guatemala lacks an immigration policy with a human rights approach. Also the country has not developed specific policies to protect, serve or assist unaccompanied migrant children.⁵⁹

⁵⁰ Source: Terre des Hommes Zimbabwe.

⁵¹ Source: Congregation of Our Lady of Charity of the Good Shepherd, Democratic Republic of the Congo.

⁵² Ibid.

⁵³ Source: Congregation of Our Lady of Charity of the Good Shepherd, Malaysia.

⁵⁴ Source: Caritas India.

⁵⁵ As a result of its large overall population, Asia is home to the largest total number of child migrants in the world. However, a relatively low proportion of its children migrate: only 1 in 110 of Asia's children live outside their country of birth. Source: UNICEF, *Uprooted*, p. 10.

⁵⁶ Source: Congregation of Our Lady of Charity of the Good Shepherd, Chile.

⁵⁷ UNICEF, *Uprooted*, p. 11.

⁵⁸ Source: Casa Alianza Guatemala.

⁵⁹ Source: Directorate of Human Rights Research, Office of the Human Rights Advocate, Guatemala.

61. A new law in Italy envisages the consolidation of the child's right to be heard in all matters affecting him or her. In Belgium, a law adopted in 2016 ensures that every accompanied child has the right to be heard, without his or her parent(s) or legal guardians being present, to make sure the child can speak freely.

62. In Serbia, owing to the lack of proper measures by the responsible institutions, the language barrier makes it impossible for migrant children to explain their situation adequately. It also effectively renders them unable to express their own opinions and prevents the authorities from determining whether their choice to migrate was voluntary and which underlying reasons motivated them to migrate.⁶⁰

63. In Honduras, there is a programme devoted to underage international migrants, which includes technical teams trained to care for this population. However, there is no national policy that deals with the issue of migrant children and, in the case of returnees, there is only one centre specialized in assisting Honduran migrant children returning from abroad and undocumented foreign-born children.⁶¹

64. In Zimbabwe, migration policies take into account protection of the rights of migrants, although the practical implementation of these policies remains a challenge.

V. Gender considerations

65. Almost no information is provided by States to explain violations of the human rights of migrant children; this includes information on violations motivated by gender.

66. Few States provide comprehensive responses, which would include provision of separate and safe accommodation for males and females, separate washing facilities and special security measures to enhance women's safety. In addition, the provision of information on gender-based violence and ways of reporting it is a major weakness in all the Member States covered in the present report. This situation increases non-reporting of abuse and allows abusers to act with impunity.⁶²

67. International migration has a differential impact by gender in Mexico. For instance, a teenage girl from the Nkya Mam ethnic group stated in an interview that her strategy to avoid sexual abuse was to ask a male fellow traveller to introduce her as his girlfriend in front of others, a pretence for which he asked to be paid.⁶³ Furthermore, heterosexual women are not the only target of gender-based violence, since discrimination against, and persecution of lesbian, gay, bisexual, transgender and intersex children has also been recorded.⁶⁴

68. Domestic service is a common job for female migrants in Mexico; the vast majority of them are under the age of 18 years. Those coming from Guatemala tend to be of indigenous origin. Furthermore, this vulnerable group has been subjected to labour exploitation and a lack of minimum labour rights, such as a legal contract or legal residence. In this context, it is almost impossible for female child migrants to obtain temporary or permanent residence status, because of the costs involved and the interests of their employers.⁶⁵

69. Authorities in Guatemala have recorded that, in many cases, the danger of rape is so high that traffickers themselves, in order to prevent any possible pregnancy, force teenage girls to undergo a contraceptive injection before the journey.⁶⁶ In Central America, most of

⁶⁰ Source: Ombudsman of Serbia.

⁶¹ Source: Honduras replies to Advisory Committee questionnaire on unaccompanied migrant children and human rights.

⁶² Source: information provided by the Office of the Special Representative of the Secretary-General on Violence against Children to the Advisory Committee, 24 February 2017.

⁶³ Center for Gender & Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (San Francisco, February 2015), p. 166.

⁶⁴ Source: General Coordination of the Mexican Commission for Aid to Refugees.

⁶⁵ Source: Fray Matías de Córdova Human Rights Centre.

⁶⁶ Source: Guatemala — St. S Children's Villages.

the children migrating to the north are male, but recently the number of females has increased.

70. In cases of sexual exploitation, female victims are in the majority. For instance, unaccompanied migrant children in Italy who originate from Nigeria, and who are often reported to be victims of trafficking and exploitation, are mostly female.⁶⁷

71. In Senegal, transit and/or destination areas are clearly distinguished by gender considerations. Thus, migration related to domestic work mostly involves female migrants and that related to jobs that need physical strength mostly involves males. Existing data in Senegal indicate that migration has gradually become more "feminized". Senegalese girls account for two out of three victims of trafficking.

72. In one of the most severe instances of gender-based migration, over 20,000 women and young girls (mostly aged between 12 and 25 years) are smuggled every year from Nepal to India for domestic or sex work and marriage.⁶⁸ In recent times, some girls as young as eight have been rescued from traffickers. Some girls are taken from their homes and communities to work as sex slaves in the brothels of Bangalore, Delhi, Mumbai, Kolkata or Siliguri. Around 200,000 girls from Nepal are working in Indian brothels.⁶⁹

73. A 2016 survey in the Syrian Arab Republic, conducted by the United Nations Population Fund (UNFPA), the American University of Beirut and Sawa for Development and Aid, found that more than one third of 2,400 refugee women and girls between the ages of 20 and 24 years had been married before reaching the age of 18 years. Among refugee girls currently aged between 15 and 17 years, some 24 per cent are married. Before the current devastating conflict erupted, child marriage was significantly less common among Syrians. Some estimates show child marriage rates to be four times higher among Syrian refugees in 2016 than among Syrians before the crisis.⁷⁰

VI. Regional and inter-State coordination

74. For the purpose of effective decision-making and assuring the legal rights of migrant children, many countries work with multi-agency coordination mechanisms, involving the authorities of the public administration, international organizations, academics and civil society organizations. There are various procedures bringing together ministers, government agencies and local institutions for the purpose of sharing information and collaborating in the management of migrant children but, in many cases, these procedures are not efficient or designed from a human rights perspective.

75. Cooperation between countries in Latin America is focused on arrest and repatriation of children to their countries of origin, which explains the invisibility of children as stakeholders. The need for protection is often absent in the analysis of situations that expose children to risk. Therefore refugee status is not an option in most cases, despite the legitimate reasons which would make children eligible. International collaboration from a perspective of prevention is rare indeed.⁷¹

76. At the regional level, Mexico is part of the Regional Conference on Migration. This is a multilateral regional forum on international migration for Caribbean, Central American and North American countries, dealing with issues of origin, transit, destination and return of migrants. Members of the Regional Conference formed an *ad hoc* group on migrant children in order to promote immediate action and effective protection of unaccompanied migrant children during all phases of the migration flow. However, despite its importance, this effort has had little real impact.

⁶⁷ Source: Caritas Senegal.

⁶⁸ Source: Caritas India.

⁶⁹ *Ibid.*

⁷⁰ UNFPA, "New study finds child marriage rising among most vulnerable Syrian refugees", 31 January 2017. Available from <http://www.unfpa.org/news/new-study-finds-child-marriage-rising-among-most-vulnerable-syrian-refugees#sthash=bPCOVkBs.dpuf>

⁷¹ Source: World Vision Latin America and the Caribbean.

77. In Mexico, Central America and the Caribbean, regional treaties do not include specific obligations for countries of transit or destination with respect to guarantees for children in migration processes, such as the prohibition of detention, due process and the principle of the best interests of the child.⁷² Regional bodies such as the Central American Integration System and the Central American Commission of Migration Directors⁷³ have been crucial to the dialogue and the implementation of regional decisions on an approach to migration. However, although regional agreements on free movement across borders (the Central America-4 single Central American visa) have favoured mobility within the region, efforts are needed for the effective protection of rights and the realization in society of Central American migrant policies and actions.

78. In 2014, the Inter-American Court of Human Rights issued advisory opinion OC-21/14 on rights and guarantees of children in the context of migration and/or in need of international protection, in response to a request made in 2011 by the member States of the Southern Common Market at the time, namely Argentina, Brazil, Paraguay and Uruguay. This was the first time that a group of States had appeared before the inter-American system of human rights with a common position on an issue of concern for the protection of human rights in the region. The advisory opinion is a regional achievement that provides innovative guidelines for defining and expanding the scope of the rights and interests of migrant children.

79. In Europe, there is some institutional collaboration for the purpose of protecting unaccompanied child asylum seekers. The Dublin III regulation on family reunification of the European Union establishes collaboration on a case-by-case basis.

80. In Southern Africa, efforts have been stepped up with the implementation of joint projects cutting across three Southern African countries. For example, the Destination Unknown campaign, which is being implemented in Mozambique, South Africa and Zimbabwe, is funded by Terres des Hommes Germany. However, regional efforts and coordination need to develop significantly in order to protect unaccompanied migrant children.⁷⁴

VII. Role of civil society

81. Many countries with serious migration issues have strengthened the relationship between government and civil society. In this regard, States recognize the work that civil society organizations carry out in order to serve, assist and guide migrant children in the fulfilment of their primary or basic needs, as well as the promotion of their human rights. On the other hand, some reports, such as the one presented by Caritas Myanmar, still perceive a lack of collaboration between government organizations, international and national NGOs and United Nations organizations.

82. Civil society plays a prominent role in uncovering the problem of insecurity, providing services and organizing institutional networks with relevant experience, as well as serving as a watchdog to ensure that States guarantee all the fundamental rights of unaccompanied migrant children.

83. Civil society intervenes in the prevention of, and response to, child abuse, neglect, violence and exploitation; it ensures that children have legal documentation and that their specific needs for durable solutions are met in their best interests. Many organizations provide education and medical assistance, psychosocial support, food, shelter and water and sanitation services. Some NGOs have even brought legal action in the case of severe violations by government agencies.

84. International NGOs and global networks such as Casa Alianza and End Child Prostitution in Asian Tourism promote training programmes for staff and experts from the

⁷² Source: Fray Matías de Córdova Human Rights Centre.

⁷³ The Commission is an initiative of the Regional Conference on Migration.

⁷⁴ Source: Terres des Hommes Zimbabwe.

police, social work and youth welfare authorities on measures to protect child refugees from trafficking and sexual exploitation and on general human rights protection.

85. Civil society has significant experience in communication and raising awareness of the human rights of migrant children. Thus, civil society has tried to reach institutions, social organizations, children, the media and society in general in order to convey its view of the situation, generate structural change and influence public policies.

86. NGOs have demonstrated a far better level of coordination and cooperation on migration issues than States. As an example, Caritas works with governmental and international organizations for the protection of children. Caritas partners include national ministries, IOM, UNICEF and the United Nations Educational, Scientific and Cultural Organization. The Regional Network of Civil Organizations for Migration is a network of civil society organizations and individuals from 11 countries in Latin America that also participates in global forums.

87. In Africa, the civil society organization *Terre des Hommes* acts as an umbrella body for all NGOs dealing with child rights, for instance in Zimbabwe. *Terre des Hommes Zimbabwe* coordinates activities and advises the Government on ways of protecting the rights of migrant children. It monitors and evaluates every activity in periodic reports on the state of child rights in Zimbabwe, which are sent to the Committee on the Rights of the Child, the Human Rights Council as input to its universal periodic review process, the African Committee of Experts on the Rights and Welfare of the Child and the Southern African Development Community.⁷⁹

88. The Federal Association for Unaccompanied Minor Refugees has been working towards the improvement of the legal situation of children who arrive in Germany without the support of a guardian. The Association runs a project to enhance active integration for young refugees in Germany. Numerous obstacles often hinder their integration. Nevertheless, many adolescents succeed in leading an active and socially committed life and fulfilling their personal goals.⁸⁰

VIII. Good practices

89. In Italy, a new reception system was implemented in 2015 with the aim of setting up first-assistance reception centres dedicated to migrant children. Initial health screening for migrant children arriving in Italy consists of regular procedures for the identification of potential physical and/or psychosocial problems, in the very early stages, in order to ensure adequate health and educational support during the rest of the reception procedure. Customized psychosocial support is needed owing to the psychological and physical stress and trauma caused by the journey and the painful personal experiences of migrant children. The Italian parliament has recently approved a new law on the protection of unaccompanied migrant children.

90. In some countries, social workers, guardians, educators or legal representatives are assigned to the unaccompanied migrant children before the asylum procedure begins. These persons have the role of accompanying the child from the beginning of the application (first interview) throughout the entire asylum-seeking process until a final decision is issued and applied.⁸¹ By law, children seeking asylum have access to legal information from the beginning.

91. In many countries, operators of asylum centres are responsible for providing schools and other activities to maintain and develop the skills of children. Some national education laws have safeguards to ensure equal access to education for all migrants at all levels. For

⁷⁹ Source: *Terre des Hommes Zimbabwe*.

⁸⁰ Source: *Find Child Protection in Asian Tourism Germany*.

⁸¹ In the United States, legal representation is provided for children only in certain cases. The State is not a party to the Convention on the Rights of the Child. Nevertheless, children have the right to be represented by legal counsel in the proceedings, and there are various programmes available to assist them.

instance, Germany is a desirable destination for migrant children because of the support they receive and the special treatment granted by the youth welfare authorities.⁷⁸

92. In Azerbaijan, some shelters provide food three times a day, special medical assistance, housing space and classes in the local language. Additionally, representatives of the office of the Commissioner for Human Rights have the right to enter any of the housing centres without prior notice and to make recommendations that have to be implemented within a defined period. However, not every unaccompanied migrant child receives respectful and proper treatment in Azerbaijan.

93. In some countries, such as Denmark, the institution that provides housing and shelter for unaccompanied migrant children is the same one that takes care of child nationals in need. This is also the case in Spain, where migrant children are often housed in centres with Spanish children in need of protection.

94. In Lithuania, the coordination between government institutions is mainly efficient in returning migrant children, without prioritizing the will of the child and without proper consideration of the situation the migrant child may find in his or her country of origin. If an unaccompanied migrant child is not returned to his or her own country, he or she is provided with a temporary residence permit valid for no longer than one year.⁷⁹

95. In Belgium, the Flemish parliament approved the implementation of a decree on integrated youth care that abandons the distinction between children who are asylum seekers and those who are not, giving rights and protected legal status to every migrant child, irrespective of his or her origin and personal history.

96. The German Federal Youth Protection Act applies to everyone under 18 years. It thus covers unaccompanied migrant children. The local youth welfare authorities are responsible for taking specific action to ensure the well-being of the child. However, as soon as the person reaches 18 years of age, the comprehensive protection measures are no longer applicable.⁸⁰

97. As stated in article 37 of the Convention on the Rights of the Child, the detention of unaccompanied migrant children is a serious human rights violation, although there is one exception in some countries such as Belgium: if a child arrives at the border, and there is a doubt about his or her age, he or she can be held in detention for three working days (extendable for another three working days in exceptional cases). Once the child's minority has been proved, he or she has to be transferred to an observation and orientation centre within 24 hours.

98. Female migrant children are seldom accorded special treatment. However, specific measures, such as female interviewers in migration services who interview female victims, have been recorded in Azerbaijan.

99. In an initiative to restore the national culture and identity of Azerbaijani migrants, the Ombudsman of Azerbaijan met representatives of the Azerbaijani diaspora in Norway and Prague and donated secondary school textbooks and publications about the history and literature of Azerbaijan.⁸¹

100. Several European Union member States have implemented prevention and development projects in third countries, intended to address the situation of unaccompanied minors who seek to travel to the European Union. A Spanish project seeks to prevent irregular migration from Senegal; Slovenia has set up a bilateral project with Afghanistan; Belgium has sent several awareness-raising missions to countries of origin of major groups of migrants. The Netherlands has set up a bilateral project in Afghanistan.

101. Mexico has specific institutional capacity for the protection of migrant children. The National System for Integral Family Development, through the programme for the

⁷⁸ End Child Prostitution in Asian Tourism Germany.

⁷⁹ Source: Ombudsman of Lithuania.

⁸⁰ Source: End Child Prostitution in Asian Tourism Germany.

⁸¹ Source: Ombudsman of Azerbaijan.

protection and integral development of children, coordinates and oversees the operation of the strategy for prevention and treatment of unaccompanied migrant children.

102. Some European countries are implementing a well-defined reception system, organized in highly specialized structures and special facilities. For instance, the Danish Immigration Service has two teams which specialize in interviewing unaccompanied children. Migrant children in Spain, whether accompanied or not, have a regime that requires the administration to consider the best interests of the child in all proceedings affecting him or her.

103. The youth care system is a network of organizations following the structure of the regional authorities in Belgium, although it is a private system. Through this organization, NGOs set up services themselves, but they are recognized and funded by the Government. All children, regardless of their age and the phase of the reception process, can be referred to the youth care services at any time, provided that they have "special needs" which are recognized by the authorities.

104. In El Salvador, there is an official mechanism for interaction with children in order to take their views into consideration. Additionally, the specialized staff of the National Council for Children and Adolescents deal with child returnees at the reception stage and conduct interviews to determine their views, problems and needs.⁸²

105. In Italy, humanitarian visas are now being provided for vulnerable children who do not receive refugee status. These humanitarian visas are authorized under Italian law.

106. In Greece, new policy and legislative measures allow access to education for 80,000 refugee and migrant children. More than 250,000 child-friendly accommodation places have been established, and new school and educational facilities have been created to provide unaccompanied children and adolescents with education in their mother tongue.⁸³

IX. Recommendations

107. From the perspective of human rights, countries of origin, transit and destination all have the same responsibilities for the protection of unaccompanied migrant children. The human rights of children have neither nationality nor borders. Migration and violence against children are closely interrelated and are often part of a continuum, starting in the country of origin and continuing in transit and destination countries.

108. The Special Representative of the Secretary-General on Violence against Children has emphasized the worrying link between migration and violence, described in the present report. Therefore, States are urged to respond in a preventive and effective manner to the various forms of violence to which migrant children are exposed, especially when travelling alone. It is urgent to ensure that there is no impunity for these acts of violence that violate international treaties.

109. The Advisory Committee recommends that States of origin should reinforce their legislative, administrative, budgetary and political efforts to give full priority to fulfilling the rights of their children, since the lack of fulfilment of basic needs, such as food, education, training for work and special protection against all forms of violence and discrimination, is the basic reason for children's decisions to abandon their own country. The commitments made by States to guarantee the human rights of their children must be accompanied by a real and sufficient budget and, above all, by increased investment in high-quality education and support for families who are raising their children in unfavourable conditions. Local, national, regional and international protection systems should be revised and strengthened. In most cases,

⁸² Source: El Salvador replies to Advisory Committee questionnaire on unaccompanied migrant children and human rights.

⁸³ Source: Information provided by a representative of Greece to the Advisory Committee, 21 February 2017.

the problem is not a lack of legislation or of programmes designed to protect migrant children, but a lack of effective application.⁵²

110. The child's best interests should be the guiding principle in the design and implementation of migration policies, and funding for child migration issues should be included in the budget of the main government agencies. There is confusion about, and often misinterpretation of, the practical application of the principle of the best interests of the child; it is therefore important to provide guidance on the practical application of this principle. The responsibility of caring for unaccompanied children should be promptly entrusted to national child protection authorities, and not left to border or security officials or immigration authorities.

111. It is highly recommended that States of origin, transit and destination should implement a participatory national policy on child migrants. A policy based on a human rights approach should analyse the financial, economic, social, cultural and administrative aspects of child migration, particularly in relation to child trafficking and labour exploitation.

112. States should eliminate any gaps between the living conditions of unaccompanied migrant children and those of children for whom the welfare authorities are responsible. The former should not be subjected to discrimination merely because of their migration status.

113. Measures should be taken to change negative perceptions of migration flows in order to end the criminalization of migrants. In many countries, migration issues continue to be dealt with from a perspective that prioritizes border protection and security rather than the protection of human rights.

114. States should reconcile domestic law with international standards. Outdated practices and laws should be restructured. Many countries are not yet applying individual rights that are enshrined in the Convention on the Rights of the Child: for example, regulations governing the grounds for expulsion and the procedure for its execution may not specifically mention children. Meanwhile, legislation on child protection in many countries lacks an approach that takes into account the particular situation of unaccompanied migrant children. One practical application of the principle of the best interests of the child is to recognize that detention of a child because of a parent's immigration status is never in the child's best interests.

115. States should set up committees with a clear mandate that will allow partners from countries of origin, transit and destination to meet and present issues and problems of common interest, and improve coordination for more effective and efficient protection of the rights of unaccompanied migrant children.

116. In the processing of asylum applications for children, States are encouraged to give due consideration to child-specific forms of persecution, including child trafficking and other forms of exploitation and violence against children.

117. Efforts should be made at every level of the migration and reception system to use staff who have been specially trained in the treatment of children and the rights of the child. States should organize and conduct regular training of officials in the correct treatment of unaccompanied children.

118. States should ensure that the support centres serving as first contact points for unaccompanied children have special secure accommodation facilities used solely for unaccompanied children.

119. States should establish programmes in centres that give priority to the social integration of migrant children. Activities such as language-learning and integration courses, learning support, education programmes and preparation for an independent way of living should be envisaged.

⁵² Source: Congregation of Our Lady of Charity of the Good Shepherd, Mexico.

120. States should provide information for migrant children that is adapted to their age and cultural situation, using simple and clear language; if necessary, the support of an interpreter should be available.

121. States should process quickly and efficiently any application for asylum of unaccompanied children; meanwhile, children should be housed in a shelter that is equipped according to international standards.

122. The Advisory Committee encourages Member States to continue to provide care for unaccompanied migrant children after they have reached the age of majority in order to support their transition to adulthood in the host or receiving country.

123. The Advisory Committee recommends that States should take into account the various categories of unaccompanied migrant children and their characteristics and situations in the design of policies and programmes to realize their human rights. However, this classification should not mean that they abandon a holistic approach to child rights.

124. The rights of migrant children must be effective and not only declarative. Their application must be measurable and applicable to countries of origin, transit and destination and to the return process, using specific indicators. The rights and principles determining the indicators to be employed are as follows:

- (a) Best interests of the child;
- (b) Recognition of the child as a rights holder;
- (c) Equality before the law and non-discrimination;
- (d) Life;
- (e) Survival and development;
- (f) Effective access to legal assistance and guarantees;
- (g) Participation and opinion;
- (h) Confidentiality;
- (i) Non-detention and non-return;
- (j) Presumption of minority;
- (k) Principle of non-revictimization;
- (l) Principle of progressive autonomy;
- (m) Principle of protection and consular assistance;
- (n) Principle of non-limitation of the attribution of rights;
- (o) Principle of priority attention.



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Agenda items 3 and 5

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Human rights bodies and mechanisms

Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights

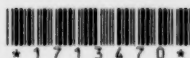
Progress report of the Advisory Committee of the Human Rights Council

Obiora Okafor and Jean Ziegler** (Co-Rapporteurs)*

* Mr. Okafor is the author of sections I, II, IV, VIII and IX. The Co-Rapporteur would like to thank Sanaa Ahmed, of the Osgoode Hall Law School, Toronto, Canada, for her assistance in their preparation.

** Mr. Ziegler is the author of sections III, V, VI, VII and X. The Co-Rapporteur would like to thank Milena Costas Trascasas for her assistance in their preparation.

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I. Mandate and background

1. In its resolution 31/22, the Human Rights Council requested its Advisory Committee to conduct a comprehensive research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights, with a special emphasis on the right to development.

2. Among its other goals, the study was commissioned with a view to compiling relevant best practices and main challenges and to make recommendations on tackling those challenges on the basis of the best practices in question. The Advisory Committee was asked to present a progress report to the Human Rights Council at its thirty-sixth session for its consideration. The Council also requested the Advisory Committee to seek, if necessary, further views and the input of Member States, relevant international and regional organizations, the United Nations High Commissioner for Human Rights and relevant special procedures, as well as national human rights institutions and non-governmental organizations (NGOs) in order to finalize the study. The Council further requested the Advisory Committee to take into account the final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (A/HRC/31/61).

3. At its seventeenth session, the Advisory Committee established a drafting group composed of Mario Luis Coriolano, Mikhail Lebedev, Obiora Chinedu Okafor (Co-Rapporteur), Ahmer Bilal Soofi (Chair) and Jean Ziegler (Co-Rapporteur). Mona Omar joined the drafting group during the eighteenth session of the Committee.

4. The present report additionally draws on earlier studies sponsored by the United Nations, including:

(a) Illicit financial flows, human rights and the post-2015 development agenda: interim study by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky (A/HRC/28/60 and Corr.1);

(b) Final study on illicit financial flows, human rights and the 2030 Agenda for Sustainable Development by the Independent Expert, Mr. Bohoslavsky (A/HRC/31/61);

(c) "Illicit financial flows, tax and human rights", background paper prepared by Esther Shubert to inform the final study;¹

(d) The negative impact of the non-repatriation of funds of illicit origin on the enjoyment of human rights: interim report by the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina (A/HRC/22/42 and Corr.1).

II. Introduction and definition

A. Definition of illicit financial flows

5. As important as it is to the problems of underdevelopment, poverty and the lack of realization of human rights around the world, the expression "illicit financial flows" is a

¹ Available at www.ohchr.org/Documents/Issues/IEDebt/IllicitFinancialFlows/Consultation/BackgroundPaperFinal.pdf.

term that has no single, universally accepted definition. The United Nations has, thus far, not expressly defined the term.

6. The emergent consensus, however, is that “illicit” means much more than simply “illegal”. Accordingly, definitions such as those offered by Global Financial Integrity, a research and advocacy organization working to curb such flows, which conflate the term “illicit” and “illegal” and thus limit the meaning to the “illegal movements of money or capital from one country to another”² are now generally disfavoured, including by the International Monetary Fund (IMF),³ the Organization for Economic Cooperation and Development (OECD)-Group of 20 (G-20)⁴ and the Tax Justice Network.⁵ Other abusive practices, such as forms of tax avoidance and transfer mispricing, are now seen, as also being within the ambit of illicit financial flows. Even more strikingly, the United Nations Conference on Trade and Development (UNCTAD) has adopted a broader definition of illicit financial flows that includes activities “contravening the law or its spirit”.⁶ What is more, the Economic Commission for Africa (ECA) has defined illicit financial flows to include “commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials”.⁷

7. Based on the foregoing, any useful definition of illicit financial flows would necessitate a broader, two-tiered interpretation of the word “illicit”. In the first interpretation, “illicit” would refer to funds which are illegally earned, transferred or utilized and include all unrecorded private financial outflows that drive the accumulation of foreign assets by residents in breach of relevant national or international legal frameworks. More specifically: funds relating to the proceeds of crime — for example, funds acquired through corruption; criminal activities; abuse of powers including theft of State assets/funds; market abuse; tax abuse; and regulatory abuse would be included.

8. In its second sense, “illicit” would refer to funds from legitimate economic activity that become illicit due to their being handled or dealt with subsequently in contravention or circumvention of the law (see A/HRC/22/42 and Corr.1, para. 5). This includes all arrangements designed to circumvent the law or its spirit such as tax evasion, forms of tax avoidance and forms of tax optimization schemes, as well as profit shifting by multinational corporations, trade misinvoicing and transfer mispricing. This definition is consistent with the one employed in the final study.

9. Finally, and perhaps more importantly, this definition, with its inclusion of tax avoidance, is in consonance with current politico-economic exigencies. Two recent “political” events seem to indicate the increasing centrality of tax avoidance to a working definition of illicit financial flows. The first is the political fallout from the Panama Papers and the second is the creation of the Platform for Collaboration on Tax, a joint initiative of IMF, OECD, the United Nations and the World Bank. Thus, tax avoidance has clearly evolved into a significant political issue distinct from its twin (i.e., tax evasion) and any

² See www.gfintegrity.org/issue/illicit-financial-flows/.

³ Rabah Arezki, Gregoire Rota-Graziosi and Lemma W. Senbet, “Capital flight risk”, *Finance and Development*, vol. 50, No. 3 (September 2013). Available at www.imf.org/external/pubs/ft/fandd/2013/09/arezki.htm.

⁴ See www.oecd.org/tax/beps/beps-about.htm and www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm.

⁵ See www.taxjustice.net/topics/inequality-democracy/capital-flight-illicit-flows/.

⁶ United Nations Conference on Trade and Development (UNCTAD), *Trade and Development Report, 2014* (United Nations publication, Sales No. E.14.II.D.4), p. 173. Available at http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf.

⁷ Economic Commission for Africa (ECA), *Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa* (2016), p. 9. Available at www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf. ECA was mandated to establish the High Level Panel by the Joint African Union Commission on Human and Peoples’ Rights-Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development at its fourth meeting, held in 2011. The Chair of the Panel was the former President of South Africa, Thabo Mbeki.

attempt to sidestep it in a study like the present one is untenable. This is particularly true, as the majority of all illicit financial flows are related to cross-border tax transactions (see A/HRC/31/61, para. 5), while corruption-based outflows are a very small fraction of the total (see A/HRC/28/60 and Corr.1, para. 14).

B. Estimates

10. Relying on trade data and balance of payments leakages for its December 2015 report,⁸ the research and advocacy non-profit organization Global Financial Integrity estimated that in 2013, \$1.1 trillion left developing countries in illicit financial outflows. This highly conservative estimate does not pick up movements of bulk cash, the mispricing of services or many types of money-laundering.⁹ UNCTAD, meanwhile, endorses the estimate of the French NGO Comité catholique contre la faim et pour le développement-Terre solidaire of €800 billion worth of illicit financial flows per annum.¹⁰ Significantly, in its analysis of the three broad motivations driving illicit financial flows — crime, corruption and tax abuse — UNCTAD argues that “only about a third of total illicit financial flows represent criminal money, linked primarily to drugs, racketeering and terrorism. ... [M]oney from corruption is estimated to amount to just 3 per cent. The third component, which accounts for the remaining two thirds of the total, refers to cross-border tax-related transactions, about half of which consists of transfer pricing through corporations.”¹¹ Comparatively, Global Financial Integrity estimates that trade misinvoicing accounts for 83.4 per cent of measurable illicit financial flows, on average.¹² ECA, on the other hand, estimates that the continent has lost more than \$1 trillion in illicit financial flows in the last 50 years and continues to haemorrhage over \$50 billion per annum. The figure is understood to be a conservative estimate due to, first, the lack of accurate data for all African countries and second, the fact that some forms of illicit financial flows — such as the proceeds of bribery and drugs/firearms and human trafficking — cannot be reliably assessed.¹³

III. Non-repatriation of illicit financial flows: overview of the problem

11. The effective repatriation of looted assets to the countries of origin remains instrumental to the global effort to support development, good governance, the enjoyment of all human rights and the strengthening of the rule of law around the world. The non-return of such funds contributes immensely to the violation of human rights (including social and economic rights), especially in developing countries. However, numbers show that only a tiny portion of illicit funds transferred abroad is effectively returned to the countries of origin. In the period 2006-2012, the total amount of assets returned by OECD States represented 1.6 per cent of those that remained frozen.¹⁴ Six years after the Arab

⁸ Dev Kar and Joseph Spanjers, *Illicit Financial Flows from Developing Countries: 2004-2013* (Global Financial Integrity, 2015). Available at http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf. In its report, Global Financial Integrity estimated that developing and emerging countries lost \$7.8 trillion during the period under study. Illicit financial flows grew at an average rate of 6.5 per cent per annum during this period and topped \$1 trillion in 2011. The authors of the report justify the selection of the period 2004-2013 for analysis by pointing to the fact that that was the most recent 10-year period for which data were available (pp. vii and 5).

⁹ See www.gfintegrity.org/issue/illicit-financial-flows/.

¹⁰ UNCTAD, “Urgent global action needed to tackle tax avoidance”, 30 September 2014. Available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=838&SiteMap_x0020_Taxonomy=CSO.

¹¹ UNCTAD, *Trade and Development Report, 2014*, p. 173.

¹² Kar and Spanjers, *Illicit Financial Flows*, p. 1.

¹³ ECA, *Illicit Financial Flows: Report of the High Level Panel*, p. 15.

¹⁴ Between 2006 and 2009, \$277 million out of \$1,225,000,000 frozen, and between 2010 and 2012, \$147.2 million out of \$1,398,000,000 frozen. OECD, *Illicit Financial Flows from Developing*

Spring, this trend remains: the looted States (Egypt, Libya, Tunisia and Yemen) have recovered only \$1 billion of the \$165 billion stolen by their former dictators.¹⁵

12. Attempts to repatriate stolen assets most commonly imply undertaking long, complex and costly mutual legal assistance procedures which, in the best scenario, may end up with the repatriation of only a portion of the misappropriated assets to the country of origin.¹⁶ The burden of reaching a solution essentially relies on the good faith and the success of the cooperation between the concerned States.¹⁷

13. Proving the illicit origin of the stolen money often turns out to be an unsurmountable requirement in practice.¹⁸ Difficulties in such procedures may lead a State to conclude extrajudicial agreements by means of which impunity is granted to those who looted the public funds in exchange for recovering a part of the assets.¹⁹

14. It is striking to see how the money that has been stolen and is urgently needed for development and the realization of all human rights is instead stalled in banks of developed countries that continue to accrue gains from it.²⁰ As long as the "dirty money" remains frozen, banks continue to charge their "captive clients" particularly high management commissions.

15. The role played by banks as facilitators of money-laundering and corruption very often goes unnoticed. Domestic laws require enhanced scrutiny of politically exposed persons, but such laws are often not observed.²¹ In addition, offshore jurisdictions provide a perfect regulatory set-up to those seeking to obscure links to money, by means of shell companies, nominee directors and secrecy.²²

IV. Best practices in the return of illicit funds

16. A number of global best practices in the return of illicit funds can be discerned from the available evidence. If globally adhered to, these best practices will help in ensuring that countries of origin have much greater access to the necessary funds to ensure the enjoyment

Countries: Measuring OECD Responses (2014), p. 88. Available from

www.oecd.org/corruption/illicit-financial-flows-from-developing-countries.pdf.

¹⁵ Transparency International, *Lost Billions: Recovering Public Money in Egypt, Libya, Tunisia and Yemen* (2016), p. 1.

¹⁶ Generally speaking, frozen assets can only be returned to the country of origin after the judicial authorities demonstrate the illicit origin of the assets, normally on the basis of information obtained within the framework of mutual legal assistance.

¹⁷ There is no structured international process or established body to facilitate asset recovery processes. In the framework of the United Nations Convention against Corruption, the Open-ended Intergovernmental Working Group on Asset Recovery was set up in 2006 to provide advice and assistance to the Conference of States Parties.

¹⁸ M. Schnebl, "Lessons learned from the past: today's response from requested countries", in G. Fenner Zink, J. Vogel, Charles Monteth and Pedro Gomes Pereira, *Emerging Trends in Asset Recovery* (2013), p. 53.

¹⁹ In 2016, following a reconciliation agreement concluded by the Government of Egypt, criminal proceedings against several persons connected with former President Mubarak were dropped. As a consequence, SwF 180 million that were frozen in Switzerland were released without any condition. Proceedings on money-laundering in Switzerland were also precluded. Swiss Confederation, "Arab Spring: Attorney General meets Egyptian authorities in Cairo", 17 December 2016.

²⁰ A report of the United States Senate showed how financial professionals and institutions were used to bring large amounts of suspect funds into the country to advance their interests. Permanent Subcommittee on Investigations, *Keeping Foreign Corruption Out of the United States: Four Case Histories* (2010).

²¹ Banks are among the biggest facilitators of tax dodging by other corporations. The list of European banks setting up offshore companies is headed by UBS and Credit Suisse. See Oxfam International, *Opening the Vaults: The Use of Tax Havens by Europe's Biggest Banks* (2017), p. 8.

²² As the Independent Expert on the promotion of a democratic and equitable international order observes: "Collusion between the world's biggest banks, specialized law firms, and consulting and accounting firms has led to a global system designed to hide money and avoid taxes by virtue of secretive offshore structures" (see A/71/286, para. 13).

of human rights, including social and economic rights, in their jurisdictions. The following are some of these best practices.

17. *Greater scrutiny of politically exposed persons.* The term politically exposed persons was devised by the Financial Action Task Force in 2003 to refer to individuals (or their family members or close associates) who were or had been entrusted with a prominent public function.²⁵ The Task Force contended that such persons should undergo additional scrutiny since they were capable of abusing their position and influence to launder money or commit related predicate offences, including corruption and bribery, as well as conduct activity related to terrorist financing. The February 2012 revision to the Financial Action Task Force rules expanded the definition of politically exposed persons to include domestic politically exposed persons, in addition to those in foreign jurisdictions.²⁶ More significantly, the definition was extended to cover politically exposed persons in international organizations.²⁷ Financial institutions and other professionals were charged with conducting this scrutiny.²⁸

18. *Reversal of the burden of proof.* This new requirement under money-laundering and anti-corruption laws — that an individual possessed of excessive wealth must demonstrate that such wealth has a legitimate origin — has had some success in impeding illicit financial flows. Further success may be achieved if destination countries accept foreign confiscation orders and provide legal and technical assistance to foreign jurisdictions.²⁹ This would be in consonance with articles 31, 43 and 48 (1) (f) of the United Nations Convention against Corruption. However, a few caveats are in order. First, several jurisdictions still adhere to the requirement that the prosecution must establish guilt beyond a reasonable doubt in criminal cases.³⁰ Second, such reversal also seems to run counter to the due process guarantees contained in the International Covenant on Civil and Political Rights, a point also articulated by Juan Pablo Bohoslavsky with respect to freezing assets or prosecuting those suspected of corruption or of handling or facilitating crime-related financial flows.³¹

19. *Pro-repatriation laws in destination countries.* The former President of Haiti, Jean-Claude Duvalier, was believed to have amassed over \$300 million by skimming government contracts. This money was deposited in Swiss bank accounts. When Duvalier was deposed by popular revolt in 1986, Haiti asked the Swiss authorities to freeze \$5 million, but couldn't secure its return since Haiti failed to mount a legal case. Duvalier

²⁵ See www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations_2003.pdf, p. 14. Article 52 of the United Nations Convention against Corruption echoes this definition but in far less detail.

²⁶ Foreign politically exposed persons are defined as individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State-owned corporations and important political party officials. Domestic politically exposed persons are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or Government, senior politicians, senior government, judicial or military officials, senior executives of State-owned corporations and important political party officials. Financial Action Task Force, *FATF Guidance: Politically Exposed Persons (Recommendations 12 and 22) (2013)*, pp. 4-5. Available at www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-FATF-Rec12-22.pdf.

²⁷ International organization politically exposed persons are persons who are or have been entrusted with a prominent function by an international organization. The term refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e., directors, deputy directors and members of the board or equivalent. While even the 2003 version of the Task Force's 40 recommendations advised caution in dealings with politically exposed persons, the focus was on foreign politically exposed persons. *FATF Guidance*, p. 3.

²⁸ *Ibid.*, p. 5.

²⁹ OECD, *Illicit Financial Flows from Developing Countries*, p. 16.

³⁰ See, for example, the response of Malaysia to the illicit funds questionnaire circulated by the Advisory Committee, available at www.unohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/QuestionnairesIllicitFunds.aspx, as well as Human Rights Council resolution 31/22, submitted on behalf of the Group of African States.

³¹ See his response to the questionnaire.

would have won the money back by default in 2002 when the statute of limitations expired, had Switzerland not invoked constitutional powers which allow it to freeze assets in order to safeguard national interests. A 2011 Swiss law which reverses the burden of proof and a court decision have paved the way for the return of the money to the country of origin. The Foreign Illicit Assets Act 2015, which allows for the repatriation of funds held in Switzerland by foreign dictators has also been helpful in this regard.¹⁰ However, several provisions of the law are open to entirely subjective interpretation that may be construed as derogating from the rights and interests of the countries of origin.¹¹ Equally problematic are article 15 of the law, which sets out criteria for "a presumption that assets are of illicit origin",¹² and article 17, which prescribes conditions for the repatriation of funds.¹³ Accordingly, such pro-repatriation laws merit the introduction of appropriate and objectively determined safeguards that will protect the interests and rights of the countries of origin.

20. *Adequate training and funding of law enforcement officers.* The forensic audit skills required to trace monies held by multiple shell companies and parked in special purpose vehicles across multiple jurisdictions are not easily available, particularly in developing countries. While some developed countries are trying to build domestic capacity, effective asset recovery requires sufficient investment, both financially and in terms of staff (training for law enforcement officers, dedicated staff with sufficient expertise and funding to carry out investigations).¹⁴

21. *Greater transparency and exchange of information.* To combat illicit financial flows, law enforcement authorities must be able to access and exchange relevant information about activities, assets or incomes of individuals, companies and legal entities and arrangements in foreign jurisdictions. In the specific area of anti-money-laundering and counter-terrorism financing efforts, the Egmont Group, comprising 152 financial intelligence units, is an example of a global platform whereby expertise and financial intelligence are shared with a view to combating both crimes.¹⁵

22. *Robust, issue-specific and cross-jurisdictional institutional and professional networks.* Restricting the ambit of their anti-illicit financial flow operations to specific issues allows such networks to focus on the details, leverage their specializations and learn from each other's successes and failures and reduces the potential for politically motivated conflict in large groups. One such example is found in the Russian Federation, where the Office of the Prosecutor General, located in the Office of the Federal Prosecutor, promotes practicable international cooperation through formal and informal patterns of interaction between various national contact centres. This cooperation extends to the identification, arrest, confiscation and restitution of assets accumulated as a result of corruption.

¹⁰ The first beneficiary of the December 2015 law was Nigeria, which stands to receive \$321 million of the monies stolen by Sani Abacha. See www.reuters.com/article/us-entire-assets-ill-S&C/USNYG29F and www.dailynigerianews.com/2016/07/20/nigeria-switzerland-sign-mou-on-repatriation-of-321m-abacha-loot/

¹¹ The section regarding when an asset freeze is admissible reads as follows: "[where] the government or certain members of the government of the country of origin have lost power, or a change in power appears inescapable, the level of corruption in the country of origin is notoriously high, it appears likely that the assets were acquired through acts of corruption or misappropriation or other crimes, the safeguarding of Switzerland's interests requires the freezing of the assets" (art. 3 (2)). Available at www.news.admin.ch/news/message/attachments/44109.pdf, p. 2.

¹² The presumption will follow if "the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased unduly, facilitated by the exercise of a public function by a foreign politically exposed person, [and] the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office".

¹³ "The restitution of assets is made in pursuit of the following objectives: (a) to improve the living conditions of the inhabitants of the country of origin, or (b) to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity."

¹⁴ OECD, *Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows*. Available at www.oecd.org/pd/Better-Policies-for-Development-2014.pdf.

¹⁵ See www.egmontgroup.org/en/content/about.

23. *Harmonization of global tax strategies.* Base erosion and profit shifting refers to aggressive tax avoidance strategies practised by multinational corporations. By exploiting gaps and mismatches in tax rules, these corporations artificially shift profits to no- or low-tax jurisdictions, thereby eroding the tax base of the host country, which inhibits a country's ability to guarantee the enjoyment of human rights to its people.⁴⁰ Often, these host countries are poor countries in the South. The harmonization of tax strategies across the globe, anti-abuse clauses in all tax treaties and enhanced disclosure requirements and transparency in both source and destination countries would eliminate the incentive for multinational corporations to shift profits from one jurisdiction to another,⁴¹ for if all jurisdictions offered the same or similar tax rates, there would be no incentive to move revenues around as a tax evasion/avoidance strategy. Similarly, if all national tax administrations worked together to ensure effective compliance, i.e., taxpayers pay the correct amount to the right jurisdiction, the opportunities for multinational corporations to engage in base erosion and profit shifting (and to thus author illicit financial flows) would be severely diminished. A few steps in this direction are already under way, including efforts by the G-20 leaders, who have called for the implementation of an inclusive framework for base erosion profit shifting,⁴² a new joint IMF-World Bank initiative on strengthening tax systems in developing countries, and the Addis Tax Initiative, designed to dramatically increase donor support for building tax capacity in poorer countries.⁴³

24. *Promotion of global anti-corruption and tax reform initiatives through greater civil society participation.*⁴⁴ The United Nations Convention against Corruption, adopted in 2004, is a high-profile example of the mobilization of States as well as civil society, non-governmental organizations and grass-roots communities to a common end: the combating of corruption. Significantly, while the Convention holds States primarily responsible for rooting out corruption and effective international cooperation, it also places similar responsibility on individuals and groups comprising civil society to provide the support States require to achieve such ends.

V. National legislation: Switzerland

25. The case of Switzerland is very illustrative, as it shows that having an adequate domestic legal arsenal and political will do not necessarily lead to the effective repatriation of stolen assets.⁴⁵

26. With approximately 26 per cent of the world market for offshore private assets under management, the country is one of the major global financial centres. With particularly favourable national legislation on banking secrecy and lax anti-laundering laws, for many years Switzerland was a commercial paradise for the banking sector. Illicit financial flows, including the personal fortunes illicitly amassed by foreign dictators, indiscriminately flowed into Swiss banks. Banks acted with complete impunity and managed to avoid any kind of public control or scrutiny.⁴⁶

27. Today, in theory, Swiss national anti-money-laundering laws oblige the banking sector to systematically scrutinize the origin of funds of dubious origin and to report any suspicious cases to the Swiss intelligence financial unit.⁴⁷ Regulations also provide for an enhanced control of politically exposed persons suspected of having enriched themselves by illicit means.

⁴⁰ See www.oecl.org/cip/bepi.

⁴¹ See Human Rights Council resolution 34/11 submitted by Tunisia on behalf of the Group of African States and other countries.

⁴² See www.oecl.org/tax-concepts-note-platform-for-collaboration-on-tax.pdf, p. 4.

⁴³ *Ibid.*, p. 1.

⁴⁴ This demand is endorsed by both Juan Pablo Bohoslavsky and the Egyptian Initiative for Personal Rights in their responses to the questionnaire.

⁴⁵ In many other cases, there is a manifest lack of political will to repatriate stolen assets.

⁴⁶ Swiss Info, "The complex case of Tunisia's blacked funds", 6 April 2015.

⁴⁷ Financial intermediaries have the obligation to report to the Money-laundering Reporting Office Switzerland.

28. However, major obstacles to enforcing anti-money-laundering legislation still remain in practice. Regulations are poorly respected and major international scandals involving the Swiss financial market continue to come to light. In the opinion of many experts, the Swiss bank reporting system simply does not work: "It is quite obvious that the rules exist, but they are applied with insufficient care. This also means that regulators are not doing their job."⁴⁴ Thus, Swiss banks continue to benefit all too often from judicial impunity.

A. Compliance of Swiss banks with anti-money-laundering legislation

29. Swiss banks have traditionally been granted the autonomy to set their own operating rules.⁴⁵ The Swiss Financial Market Supervisory Authority, FINMA, is in charge of monitoring all institutions holding a banking licence in Switzerland. Despite being a public control body, FINMA does not belong to the federal administration. Its action is apparently independent from external interferences but not from the banks. The Board of Directors is composed mainly of former bank managers, as is most of its staff.⁴⁶ Furthermore, FINMA is financed by the very same institutions that are under its supervision: the banks.⁴⁷

30. By law, FINMA is endowed with a great margin of discretion. This includes the capacity to refuse collaboration with criminal prosecutors or any other national authorities when it is considered to be incompatible with a procedure under way or with the aims of surveillance of financial markets. FINMA can also deny information not available to the public or refuse to handle any documentation to preserve its own supervisory procedure.⁴⁸

31. The Authority's annual reports do not provide full information on cases of violation of the bank's due diligence, particularly regarding politically exposed persons. Even when sanction procedures are considered, information on the entities under investigation, the final outcomes of such procedures or the sanctions imposed are only partially released.⁴⁹

32. A 2016 evaluation report on Switzerland by the Financial Action Task Force concluded that the process of reviewing existing customers in the banking sector "is unsatisfactory overall".⁵⁰ More specifically, sanctions imposed by the supervisory authorities were considered insufficient to prevent further violations.⁵¹ Doubts about the efficacy and credibility of the whole anti-laundering dispositive have also been raised by civil society.

33. In fact, lack of transparency on accountability procedures undertaken against the banks may lead to the conclusion that they are still accepting "dirty money" "below the radar" and that such activities continue to go unnoticed by the general public.⁵² This situation may demonstrate that the financial sector has gained such great power and lobbying capacity as to allow it to avoid taking seriously its obligations to undertake preventive measures and cooperate with public authorities in this field.

⁴⁴ O. Longchamp and M. Herkenrath, "Money-laundering, liability and sanctions for financial intermediaries — the issue of having the assets of politically exposed persons in Switzerland", in Fenner Zinkernagel, *Emerging Trends in Asset Recovery*, p. 128; "Banks scrutinize regimes' assets", *Wall Street Journal*, 23 February 2011.

⁴⁵ In 2015, the Swiss Financial Market Supervisory Authority, FINMA, approved the Swiss banks' code of conduct with regard to the exercise of due diligence, drafted by the Swiss Association of Bankers.

⁴⁶ The current FINMA Director, Mark Branson, is a former Director of UBS and was previously in charge of UBS Japan, involved in the scandal of the manipulation of the Libor rate.

⁴⁷ The Authority's costs are borne by the supervisory fees and levies paid by those institutions.

⁴⁸ See article 40 of the *Loi sur l'Autorité fédérale de surveillance des marchés financiers (Loi sur la surveillance des marchés financiers)*.

⁴⁹ Longchamp and Herkenrath, "Money-laundering", p. 133.

⁵⁰ *Anti-Money-laundering and Counter-Terrorist Financing Measures: Switzerland: Mutual Evaluation Report*, December 2016, pp. 91 and 105.

⁵¹ FINMA sanctions are particularly painless for banks; see "Trois banques épinglées pour leur gestion de fonds", *24 Heures*, 21 October 2013.

⁵² O. Longchamp, report on Switzerland's experience of assets recovery, working document, Public Eye (forthcoming).

B. Return of stolen assets

34. The situation is absolutely striking in relation to the return of stolen assets. Hundreds of millions of dollars of illicit provenance remain frozen in Switzerland.⁵³ The Government claims that it is seeking — honestly and vigorously — to return these funds to the countries of origin.⁵⁴ It also claims that the lack of restitution is eroding the good reputation and integrity of the Swiss financial centre. There is a similar willingness at the cantonal level. In Geneva, for example, the millions of dollars in illicit financial flows laundered through the housing market have led to a housing crisis that disproportionately affects the working class and the poorest sectors of the society.

35. A number of legal matters relating to the return of stolen assets are currently pending before the Swiss courts. National legislation provides means to appeal at all stages of the proceedings. Procedures are protracted and lawyers are making huge profits from assisting criminals to hide and benefit from illicit financial flows. In the case of the former dictator of Nigeria, for example, those assisting Sani Abacha in avoiding the restitution of the stolen assets took a total of \$17 million.⁵⁵ They are competent and efficient in delaying tactics, which partially explains why the assets stolen by the Ben Ali-Trabelsi and Mubarak clans in 2011 have not yet been returned to the countries of origin.

36. The Foreign Illicit Assets Act 2015 was passed to facilitate the restitution of illicit assets also in cases where mutual legal assistance is not feasible or fails. However, the impact of this specific regulation remains to be seen in practice. The law may facilitate the release of illicit assets frozen when a solution of compromise is reached between the affected State and the person suspected of misappropriation. Such arrangements are controversial, since they also preclude any legal proceedings initiated in the country of origin as well as anti-money-laundering investigations taking place in Switzerland.⁵⁶

VI. Case studies on the repatriation of illicit financial flows

37. The following examples show the role financial institutions play by blatantly accepting suspicious funds. Banks and law professionals profit from these protracted and complex processes to make huge profits at the expense of the affected countries, which need the money for development and the enjoyment of all human rights.

A. Nigeria

38. This is one of the exceptional cases in which a looted State managed within a reasonable period of time to successfully repatriate much of the illicit financial flows transferred outside its shores. As is well known, the former dictator, Sani Abacha, and his entourage managed to misappropriate over \$2 billion of State funds.⁵⁷ Money was systematically diverted from the Central Bank to banks in Austria, Liechtenstein, Luxembourg, Switzerland, the United Kingdom of Great Britain and Northern Ireland and Jersey, and the United States. In Switzerland alone, the Abacha clan had a total of 130 bank accounts.

⁵³ The country has returned \$2 billion in the past 30 years. However, hundreds of millions of dollars are still frozen.

⁵⁴ Switzerland has recently published the booklet *No Dirty Money: The Swiss Experience in Returning Illicit Assets*, December 2016.

⁵⁵ S. Hesson, "La fin de l'affaire Abacha enrichit deux études d'avocats genevois", *Le Temps*, 17 March 2015.

⁵⁶ O. Longchamp and Herkenrath, "Money-laundering", p. 136.

⁵⁷ The looted funds were transferred directly to bank accounts abroad held by offshore companies belonging to members of the Abacha clan or foreign businessmen, who then remitted the same sums to members of what were characterized as "a criminal organization". See E. Monfrini and Y. Klein, "The Abacha case", in M. Pieth, ed., *Recovering Stolen Assets* (2008), pp. 10-11.

39. In 2000, investigations opened by the Swiss authorities resulted in a report incriminating 14 banks for lack of compliance with their due diligence duties under anti-money-laundering legislation. The authorities, however strikingly concluded that the existing regulatory framework was in principle sufficient and even extensive if compared internationally and that the Swiss financial centre had appropriate rules designed to avoid undesirable funds.⁵⁹

40. In 2004, thanks to the action of the Geneva Public Prosecutor, Bernard Bertossa, the greater part of the frozen assets were repatriated to Nigeria. Switzerland responded favourably to Nigeria's request for mutual legal cooperation. In addition, criminal investigations into money-laundering were opened pursuant to articles 305 ff of the Swiss Criminal Code. By considering that the structure set up by Abacha and his accomplices constituted a "criminal organization", the Swiss courts confirmed that the illicit origin of the assets may be presumed under certain circumstances.⁶⁰

41. In 2016, Nigeria tried to recover another \$321 million that had been confiscated in Switzerland. However, after an extrajudicial agreement reached between the Government of Nigeria and the family of the former dictator, Switzerland agreed to return part of the funds to the Government while simultaneously dropping criminal proceedings against Abba Abacha, the son of the deceased dictator, who waived all further claims to the assets.⁶¹

B. Tunisia

42. For more than 20 years, the former dictator of Tunisia diverted public funds and public properties for his own benefit. According to the World Bank, more than 21 per cent of the profits generated by the Tunisian private sector were controlled by the dictator's clan.⁶² Zine El Abidine Ben Ali and his accomplices used public institutions as tools to favour their private businesses and manipulated the law to serve their personal interests and punish those who opposed them.

43. In 2011, mutual legal assistance proceedings to clarify the origin of the \$61,750,000 blocked in Switzerland were immediately undertaken. FINMA also announced sanctions and stated that the identity of the banks involved in the looted Tunisian public treasure would be made public. The list was never released, nor was information on any eventual sanction imposed on any of the banks suspected of accepting and hiding the money of the Ben Ali and Mubarak clans. In 2013, FINMA concluded that only in 4 of the 22 cases examined was it necessary to initiate a binding "administrative" procedure to secure information on the role played by the banks in "grave wrongdoings".⁶³

44. In March 2015, Tunisia filed a civil action against HSBC claiming SwF 114 million plus interest for having accepted the fortune of Ben Ali's brother-in-law. The funds of illicit origin would have transited through HSBC accounts in the period when corruption was particularly notorious in Tunisia. Reportedly, the bank's own compliance body had pointed out this fact to the managers.⁶⁴

⁵⁹ Commission fédérale des banques, "Fonds Abacha auprès des banques suisses", 30 August 2000, p. 18.

⁶⁰ Swiss Federal Office of Justice, "Abacha funds to be handed over to Nigeria: majority of assets obviously of criminal origin", 18 August 2004.

⁶¹ "Nigeria: Genève clôt en catimini le dossier du dictateur Abacha", *Le Monde*, 17 March 2015.

⁶² B. Rijkers, C. Freund and A. Nacifora, *All in the Family: State Capture in Tunisia*, World Bank, Policy Research Paper No. 6810 (2014).

⁶³ FINMA, *Obligations de diligence des banques suisses en relation avec les valeurs patrimoniales des personnes politiquement exposées*, 10 Novembre 2011, pp. 7-10 (subsequently updated).

⁶⁴ The bank charged management commissions of 2 per cent, amounting to a total of SwF 8.3 million. "La Tunisie réclame 114 millions de francs à HSBC pour avoir accueilli l'argent du clan Ben Ali", *Le Temps*, 19 March 2015.

45. After six years of proceedings, only a quite paltry sum (\$250,000) has been repatriated.⁶⁴ An early order to return to Tunisia \$40 million whose criminal origin had been sufficiently established was, however, overturned on appeal by a court which found a violation of the accused's right to be heard.

46. The repatriation of the funds will be possible once final and enforceable judgments confirming the illicit origin of the frozen assets have been issued or concluded in Tunisia. The Tunisian Government has to prove the acts of embezzlement and corruption committed by Ben Ali and his accomplices. But freezing orders have a limited duration, legal procedures are too slow and the crimes that are at the origin of the requests for repatriation are subject to statutes of limitation.

C. Malaysia

47. The case involving Malaysia refers to the alleged misappropriation of \$4 billion from a State-owned investment fund set up in 2009 to promote economic and social development projects. Dozens of interconnected people, companies and Governments have been identified as having a connection with the fund, which operates mainly from the Cayman Islands. Malaysia has rejected the Swiss offer of legal assistance, claiming that criminal investigations are being conducted by its own authorities.⁶⁵

48. In Switzerland, criminal investigations into bribery and money-laundering revealed that about \$800 million were illicitly deviated through three Swiss banks (reportedly, BSI SA, Coutts & Co. Bank and Falcon Private Bank).⁶⁶ FINMA has withdrawn the banking licences of all of them for flagrant violations of anti-money-laundering obligations and has confiscated the illicitly gained profits from Falcon (SwF 2.5 million) and Coutts & Co. (SwF 6.5 million). Only in the case of Coutts were criminal proceedings also opened for suspected deficiencies in the bank's internal organization and FINMA is reportedly considering opening enforcement proceedings against the responsible employees.⁶⁷

VII. Negative impact of the non-repatriation of illicit financial flows on the enjoyment of human rights

49. The non-repatriation of illicit financial flows not only contributes to increasing the gap between developed and developing countries; it also hinders the socioeconomic development of the developing countries in particular, as well as their capacity to deliver basic social services to their citizens. As a consequence, citizens' confidence in the Government and the rule of law is eroded, and corruption and poverty perpetuated.

Non-return jeopardizes the enjoyment of economic, social and cultural rights

50. Illicit financial flows reduce the resources to be committed to social and economic investment and infrastructure, jeopardizing the State's ability to fulfil economic, social and cultural rights to the maximum of its available resources. Diversion of funds through corruption particularly impacts on the socioeconomic rights of the population of the poorest States, which may encounter difficulties in fulfilling their minimum core obligations with respect to the most basic rights: the right to food, the right to an adequate standard of living, and the rights to health and education.⁶⁸

⁶⁴ "Switzerland to return over USD 250,000 of Ben Ali's money to Tunisia", *Africanews*, 1 June 2015. In addition, Tunisia managed to recover \$28.8 million held by Ben Ali's wife in a Lebanese bank.

⁶⁵ See www.admin.ch/gov/en/start/documentation/media-releases.msg-id-60510.html.

⁶⁶ *Ibid.*

⁶⁷ FINMA, "FINMA sanctions Coutts for IMDB breaches", 2 February 2017; "Falcon sanctionné pour ses manquements en lien avec IMDB", 11 October 2016.

⁶⁸ See, for example, African Commission on Human and Peoples' Rights, communications Nos. 25/89, 47/90, 56/91 and 100/93, *Free Legal Assistance Group and others v. Zaïre*.

51. The negative consequences for the affected population derived from the non-repatriation of illicit financial flows are evident. When the population is deprived of the minimum quality standards indispensable for survival, not only the civil and political but also the economic, social and cultural rights of the population are violated. Such violations undoubtedly have a direct impact on the dignity of the citizens, whose most fundamental rights are deliberately curtailed.

52. In Tunisia, the return of the assets frozen in several countries would contribute to alleviating the effects on the population of the increasing fiscal pressure caused by the country's deteriorating economic situation. The repatriation of the looted money to Yemen would certainly contribute to ameliorating the extreme living conditions of the population in a country with one of the lowest rates of human development.⁶⁹

Non-return hinders the realization of the right to development

53. The non-repatriation of illicit financial flows deprives countries of origin of the much-needed additional resources for public investment, jeopardizing its development prospects. Developing countries lose billions of dollars every year through illicit financial flows. In Africa, it is estimated that over the past 50 years, the continent has lost \$1 trillion in illicit financial flows. This amount is equivalent to all the official development assistance received in the same time frame.⁷⁰

54. Furthermore, non-repatriation of illicit financial flows creates immense human suffering and clearly undermines development. Countries lose capital for investment and revenue that could have been used to finance development programmes. These outflows pose a particularly serious concern to countries with high levels of poverty and increasing resource needs due to population growth. Reduction of official development assistance due to the global economic and financial crisis is compelling even more developing countries to look to their own resources to fund their development agendas.⁷¹

55. Deprived of important monetary assets and of the revenues of their natural resources, developing countries are forced to reduce investment in key development sectors or to increase their debt burden in order to introduce the necessary policies at the domestic level. Lack of public policies and investment in social and economic programmes disproportionately affects the weakest sectors of the population.

56. Illicit financial flows also undermine State capacity and governance. The people and corporations behind illicit financial flows usually become involved in acts of corruption in order to transfer the proceeds of bribery and abuse of power. By preventing the proper functioning of regulatory institutions, they compromise State officials and institutions. This situation may reverse all efforts to reinforce State structures and to consolidate the rule of law.

57. Countries which are rich in natural resources and countries with inadequate or non-existent institutional architectures particularly attract illicit financial flows. In a memorandum of understanding on the modalities for the return to Nigeria of stolen assets confiscated by the United Kingdom of Great Britain and Northern Ireland, it was acknowledged that the embezzlement of large amounts of State funds considerably reduced the resources available to the Government of Nigeria to provide social services or invest in infrastructure and economic development in order to move the country to greater

⁶⁹ Yemen ranks 168 out of 188 countries on the Human Development Index. In 2013, 4 per cent of the population was considered by the United Nations Development Programme as suffering from multidimensional poverty. Today, food insecurity affects 70 per cent of the population as a result of the armed conflict. See H. Kodmani, "Guerre oubliée au Yémen : la famine menace", *Libération*, 23 March 2017.

⁷⁰ ECA, *Illicit Financial Flows: Report of the High Level Panel*, p. 14.

⁷¹ *Ibid.*, p. 53.

prosperity. The plundering of national revenues may thus ultimately lead to a violation of the right of the people to freely dispose of their natural wealth and resources.⁷²

Non-return reinforces impunity and perpetuates corruption

58. The non-repatriation of stolen assets sends the wrong message: that cases of grand corruption will remain unpunished. Impunity must be avoided, particularly where national resources and public funds have been systematically plundered, or such actions have been tolerated, by those in the Government or in powerful positions.⁷³

59. Although the concept of crimes against humanity has traditionally been linked to grave or systematic violations of civil and political rights, there is no doubt that the international community also has a great interest in putting an end to impunity for economic and financial crimes, particularly those that can be qualified as grand corruption. There is no doubt that criminal organizations emerging from kleptocratic regimes, i.e. those whose only objective is the pillage of the State's resources, cause direct damage to the State and affect the fundamental rights and freedoms of the population.⁷⁴

60. It is therefore not audacious to affirm that there is a connection between crimes against humanity and the systematic pillage of the public resources of a country. Corruption and abuse of power, when systematically orchestrated from the Government, lead to an unjustified increase of the debt burden and curtail the socioeconomic progress and sustainable development of the country.

61. Economic crimes must be an integral part of transitional justice frameworks. Amnesties, immunities or statutes of limitation should not serve to guarantee impunity to those responsible for violations of economic, social and cultural rights which may amount to crimes against humanity. Accountability for serious human rights violations and economic crimes committed under past regimes must be prosecuted, as amnesty in cases of grand corruption contributes to the weakening of processes of transition to democracy.

VIII. Main challenges inhibiting the return of illicit funds

62. As noted earlier, attempts to return illicit funds expatriated mostly from developing countries have too often been difficult or ineffective. The main challenges that inhibit the return of these funds are described in the following paragraphs.

Lack of political will

63. Repatriation involves the return of funds that have, over time, become imbricated in the economies of the countries to which they have been transferred. Some of these destination countries have adopted lax financial regulation in a deliberate attempt to compete with offshore financial centres for illicit funds, and the negative discourse surrounding such centres is intended to skew competition.⁷⁵ The withdrawal of these funds thus would require the destination countries to take action against powerful domestic

⁷² In a complaint filed with the African Commission on Human and Peoples' Rights by the Asociación Pro Derechos Humanos de España against Equatorial Guinea, the organization considered that the Government's plundering of national oil revenues violated the right of the people of Equatorial Guinea to freely dispose of their natural wealth protected by the African Charter on Human and Peoples' Rights. See www.opensocietyfoundations.org/sites/default/files/a_communication_20071012.pdf

⁷³ For a definition of grand corruption, see E. Hava, "Strategies for preventing international impunity", *Indonesian Journal of International and Comparative Law*, vol. II, No. 3 (July 2015), p. 520.

⁷⁴ See E. Monfrini and Y. Klein, "L'Etat requérant lésé par l'organisation criminelle: l'exemple des cas Abacha et Duvalier", in *Etat de droit et confiscation internationale*, Sandrine Giroud and Alvaro Borghi, eds. (Edis, 2010), p. 135.

⁷⁵ See, generally, Donato Masciandaro, ed., *Global Financial Crime: Terrorism, Money-laundering and Offshore Centres* (London, Ashgate, 2004) and J.C. Sharman, *The Money Laundry: Regulating Criminal Finance in the Global Economy* (Ithaca, Cornell University Press, 2011).

interest groups such as financial institutions⁷⁶ and real estate developers; this is far harder than blaming island nations far away for their lax financial practices.

64. *Benefits of illicit financial flows to local property markets.* Illicit funds are now key to shoring up real estate markets in many places, including London, New York and Vancouver, Canada. The impact of their repatriation would not be limited to construction- and property finance-related industries, but would also be manifest in decreased spending power available to most consumers in economies of these destination countries.

65. *Benefits of illicit financial flows to local financial markets.* In 2009, the Executive Director of the United Nations Office on Drugs and Crime revealed that at the height of the 2008 financial crash, drug money was pumped into the global financial system to keep it afloat.⁷⁷ Foreign funds, including illicit financial flows, have also been key to shoring up all too many credit-driven, developed economies due to their lack of domestic savings that would finance their economic growth.⁷⁸ Thus, the hasty withdrawal of any funds, licit or illicit, due to the need to repatriate them to their countries of origin would severely affect the economies of many developed countries.

66. *Benefits of illicit financial flows to local professional service providers.* Many jurisdictions have specialized in the provision of financial and legal services to those who are involved in the generation and facilitation of illicit financial flows.⁷⁹ However, the list of illicit financial flows-friendly countries/jurisdictions includes Switzerland, Hong Kong and Singapore, as well as Delaware, Nevada and Wyoming in the United States.⁸⁰ Thus, the hasty repatriation of the illicit funds which are “banked” in these jurisdictions would threaten the stability and prosperity of the economies of these jurisdictions.

Difficulty of establishing a nexus between illicit financial flows and crime and/or civil wrongdoing

67. In the case of illicit flows resulting from criminal conduct, establishing a clear link between crime committed in the country of origin and the proceeds of crime in the destination jurisdiction is inordinately difficult.⁸¹ This difficulty is compounded by the fact that the link — the proof — needs to be incontrovertible if repatriation is to be ordered. Where the illicit financial flows stem from activities which qualify as civil wrongdoings, repatriation is all the more difficult since there is no clearly established international convention for doing so. As noted in section V, while instruments such as the United Nations Convention against Corruption urge States to “consider” cooperating in such cases, this provision remains of advisory — and thus limited — utility.

Difficulty of establishing beneficial ownership and/or piercing the corporate veil

68. Whether illicit financial flows stem from crime, corruption or tax abuse, many — if not most — transactions are conducted behind several corporate veils and routed through

⁷⁶ Jack Smith, Mark Pieth and Guillermo Jorge, “The recovery of stolen assets: a fundamental principle of the UN Convention against Corruption”, U4 Brief No. 2, Chr. Michelsen Institute, February 2007. Available at www.u4.no/publications/the-recovery-of-stolen-assets-a-fundamental-principle-of-the-un-convention-against-corruption/. Malaysia picks up this point in its general observations in response to the questionnaire.

⁷⁷ Rajeev Syal, “Drug money saved banks in global crisis, claims UN advisor”, *Observer*, 13 December 2009, available at www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-chief-claims.

⁷⁸ See www.forbes.com/sites/mikepatton/2014/10/28/who-owns-the-most-us-debt/#20e0d1141907.

⁷⁹ See Shaxson and Christensen, “Tax competitiveness”.

⁸⁰ Jana Kasperkevic, “Forget Panama: it’s easier to hide your money in the US than almost anywhere”, *Guardian*, 6 April 2016. Available at www.theguardian.com/us-news/2016/apr/06/panama-papers-us-tax-havens-delaware.

⁸¹ Cynthia O’ Murchu, “Follow the money”, *Financial Times*, 14 August 2014.

multiple jurisdictions to extinguish traces of ownership.⁸² As such, it is too often very hard to conclusively identify the beneficial owner of a company.

Debates over conditionality or the human rights-based approach

69. This is rapidly shaping into one of the most divisive issues in the repatriation of illicit funds. Advocates of conditionality — particularly in the destination countries in the global North — insist that the return of funds be conditioned on promises that the country of origin will use them to satisfy human rights obligations.⁸³ Predictably, countries of origin in the global South are vehemently opposed to the idea of conditionality being attached to the use of their own funds.⁸⁴ Further, they contend that they should be able to design and fund development projects based on their national priorities, not on Western notions of “appropriate” human rights projects. The notion is thus highly problematic.

IX. Importance of international cooperation in the return of funds of illicit origin

70. Illicit financial flows carry serious economic and human rights consequences that cannot be redressed without concerted international cooperation, and even solidarity. For example, the African Commission on Human and Peoples’ Rights notes that both multinational corporations and individuals from Africa drain billions of dollars every year from the continent.⁸⁵ Unless all countries commit to significantly more coordinated global action to address loopholes, weak laws and monitoring across jurisdictions, many such countries will continue to be drained of their revenue potential.

71. The return of illicit financial flows derived from tax abuse, criminal activity and/or corruption depends in part on the forensic audit skills and strong State prosecution services that some countries of origin, particularly developing countries, lack. This need is exacerbated where law enforcement authorities lack the ability to prosecute transnational crime⁸⁶ and where criminal syndicates and politicians control or have significant influence over the legal and State authorities in the source countries. Finally, repatriation is also exceedingly difficult where the underlying wrongful act is civil in nature rather than criminal.

72. In many cases where illicit financial flows are routed via multiple jurisdictions to their eventual destination, repatriation also requires engagement with multiple legal regimes. Without greater international cooperation, it will be even more difficult for many countries of origin to trace illicit financial flows and meet the standards of proof required to effect repatriation. There will also be a host of procedural issues. In Jamaica, for example, domestic courts necessarily address the issue of restitution under local statutes. However, the procedural law does not differentiate between residents and non-residents when it comes to victims and third-party claimants, thus creating problems regarding witness attendance and the taking of admissible evidence.⁸⁷ Further, the criminal networks and politicians who control State and legal authorities in some of the countries of origin will continue to facilitate illicit financial flows unless destination countries recognize their

⁸² Emile van der Does de Willebois and others, *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What To Do About It*, Stolen Asset Recovery Initiative (Washington, D.C., World Bank, 2011) available at <http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it>, and OECD, *Better Policies for Development 2014*, p. 27.

⁸³ See the response of the European Union to the questionnaire.

⁸⁴ See, for example, the response of Juan Pablo Bohoslavsky to the questionnaire and Human Rights Council resolution 31/22.

⁸⁵ Resolution 236 adopted by the African Commission on Human and Peoples’ Rights on 23 April 2013, available at www.achpr.org/sessions/53rd/resolutions/236/.

⁸⁶ Response of Jamaica to the questionnaire.

⁸⁷ Response of Jamaica to the questionnaire.

primary responsibility in preventing such crimes against humanity and divert illicit financial flows from their countries.

73. In their ostensible competition for foreign investment, speculative financial flows and/or individual wealth, poor countries are increasingly pitted against each other in needless "tax wars" that do little more than eventually shrink almost all of their tax bases, distort markets and lead to a regulatory race to the bottom.⁸⁸ Greater international cooperation can allow poor countries to resist the temptation to institute such "beggar-thy-neighbour" policies and maintain a common minimum standard to protect all of their respective markets and tax bases.

74. In order to prevent illicit financial flows, all stakeholders need to be equally committed to both South-South and North-South cooperation. The necessity of North-South cooperation stems from the fact that the final destinations of almost all illicit financial flows are either rich Western countries or their satellites.⁸⁹ This point is picked up by the Independent Expert in his final study, in which he noted that "many of the world's most important secrecy jurisdictions are developed countries, which have historically been overlooked in their role in facilitating tax evasion" and illicit financial flows (see A/HRC/31/61, para. 9). Further, in a 2014 report, OECD noted that "without action, OECD countries are at risk of becoming safe havens for illicit assets from developing countries".⁹⁰ Unless secrecy jurisdictions and destination countries commit to doing all that they can to prevent illicit financial flows landing on their shores, the "safe haven" charge is likely to stick.

75. South-South cooperation is also critical as it will, first, arrest regional beggar-thy-neighbour taxation and anti-corruption policies by enhancing cooperation, presenting a common front and reducing harmful competition. Second, this kind of cooperation could conceivably lead to the formation of regional economic blocs focused on this issue that would tend to strengthen the negotiating positions of the poorer countries vis-à-vis the relevant multinational corporations and their countries of origin.⁹¹ This will address the fundamental imbalance of wealth and power between these actors.

X. Conclusions and recommendations

76. **Without effective repatriation of the stolen assets, developing countries and countries in transition to democracy are deprived of very much needed resources, and the opportunity to take advantage of the momentum for undertaking the economic and social reforms necessary for bolstering development, is being missed. The delaying tactics of Governments and banks as well as attempts to justify hindrances to the effective return of illicit financial flows are not only reproachable from a moral point of view but also politically and economically unacceptable.**

77. **The fact that the countries that struggled for democracy during the Arab Spring had not been able to recover the money looted by their former dictators is scandalous. Stolen assets must be effectively returned not only because those resources are urgently needed, but also because of their highly symbolic value. The international community must urgently send a strong message: corruption promoted by the highest levels of the State cannot be tolerated and will not go unpunished.**

78. **States must cooperate in good faith to facilitate the repatriation of illicit financial flows. They must enact proactive legislation and promote policies and practices aimed at facilitating the smooth and prompt return of the assets to the**

⁸⁸ Shaxson and Christensen, "Tax competitiveness".

⁸⁹ OECD reports on illicit financial flows; J. Henry, "How to respond to the Panama Papers", *Foreign Affairs* (April 2016), available at www.foreignaffairs.com/articles/panama/2016-04-12/taxing-tax-havens; and Shaxson and Christensen, "Tax competitiveness".

⁹⁰ OECD, *Illicit Financial Flows from Developing Countries*, p. 3.

⁹¹ Krishen Mehta and Erika Dayle Sui, "Ten ways developing countries can take control of their own tax destinies", in Pogge and Mehta, *Global Tax Fairness*, p. 353.

countries of origin. The international community must struggle to curb predatory financial practices which lead to human rights violations and contribute to erosion of the rule of law.

79. The Advisory Committee of the Human Rights Council recommends that Member States:

(a) Ensure the prompt and unconditional repatriation of funds of illicit origin to the countries of origin. A renewed, decisive and pro-active global commitment is needed to tackle the phenomenon of illicit financial flows and their ensuing negative impact on human rights and the right to development. States must take urgent action to push forward the procedures aimed at the recovery of stolen assets. They must adopt all measures needed to prevent the plundering of public assets to the benefit of private individuals or entities. Corruption and other practices that tend to maximize profits by circumventing the spirit of the law must be curtailed. Policies to end corruption and money-laundering must be decisive, and preventive measures must be effective and implemented in practice;

(b) Ensure that the crimes that are at the origin of illicit financial flows and grand corruption are adequately sanctioned and do not remain unpunished or subject to statutes of limitation. Impunity for those who systematically and massively plunder public resources is unacceptable. Those responsible for grand corruption must be held accountable and amnesty laws should not be misused to avoid justice. Under certain circumstances, financial crimes with transnational implications should be prosecuted at the international level and not be subject to statutes of limitation. States should consider ways to characterize as punishable international crimes, i.e., as crimes against humanity, acts of corruption that are carried out systematically and have a genuine impact on the social and economic well-being of the population, i.e., acts that lead to the dismantling of social services, thereby hindering economic and social progress;

(c) Ensure that the banks and financial intermediaries involved, notably those specialized in asset management, are held accountable for their involvement in illicit financial flows. States must urgently ensure that banks and other financial intermediaries operating in their jurisdiction conduct their business with due diligence. States should monitor their compliance with all preventive measures envisaged at the national level effectively and hold banks and banks managers accountable in cases of violation. Criminal sanctions must be envisaged and they must be proportional to the gravity of the case. States must ensure that financial intermediaries proactively take actions to fight corruption and money-laundering. Banks must provide proof of the actions that are being taken to avoid "dirty money". States must ensure that regulatory authorities undertake all necessary measures to guarantee banks' due diligence and accountability and that those measures are implemented in practice; the authorities must also effectively demonstrate impartiality and independence in their functioning;

(d) Support the suppression of tax havens and the regulation of offshore companies. The problematic surrounding asset recovery processes should be addressed as part of a broader international dialogue on the reform of the international financial system. States should actively support global initiatives aimed at curtailing those practices in the financial sector that favour illicit financial flows. More specifically, they must join the struggle undertaken by OECD against tax havens and offshore companies by supporting the setting up of a publicly available international register of offshore companies; prohibiting anonymous shares in limited liability companies; and making the ultimate beneficiary nominee of shares publicly known;

(e) Support action by the Security Council on the freezing of illicit financial flows and encourage the extension of similar measures to other cases. Council resolutions 2140 (2014) and 2216 (2015) on the situation in Yemen, by means of which individuals or entities designated by the 2140 Sanctions Committee are listed and sanctioned, are particularly welcome. Analogous measures should be considered in

other similarly blatant cases, notably to support judicial cases dealing with the non-repatriation of public money stolen by means of grand corruption.

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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Human rights bodies and mechanisms****Good practices and challenges, including discrimination, in
business and in access to financial services by indigenous
peoples, in particular indigenous women and indigenous
persons with disabilities****Study of the Expert Mechanism on the Rights of Indigenous Peoples***Summary*

The Expert Mechanism on the Rights of Indigenous Peoples has carried out the present study pursuant to the request made by the Human Rights Council in its resolution 13/13. In the study, the Expert Mechanism proposes a human rights-based understanding of indigenous peoples' businesses and access to financial services and identifies encouraging practices and challenges in that area. Expert Mechanism advice No. 10 on indigenous peoples' businesses and access to financial services is contained in the annex.



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I. Introduction

1. In its resolution 33/13, the Human Rights Council requested the Expert Mechanism on the Rights of Indigenous Peoples to prepare a study on good practices and challenges, including discrimination, in business and in access to financial services by indigenous peoples, in particular indigenous women and indigenous persons with disabilities, and to present it to the Council at its thirty-sixth session.

2. The Expert Mechanism called for States, indigenous peoples, national human rights institutions and other stakeholders to provide information for the study. The submissions received have been made available on the Expert Mechanism website whenever permission to do so has been granted. The study also benefited from presentations made at the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship, which was held in Boulder, United States of America, from 6 to 7 March 2017, and organized by the Office of the United Nations High Commissioner for Human Rights and the University of Colorado Law School.

II. A human rights-based understanding of indigenous peoples' businesses

A. Grounding indigenous peoples' business and access to financial services within a human rights framework

3. Indigenous peoples have their own economies, including traditional livelihoods and ways of producing, selling and distributing goods or services, as well as concepts of profit, saving and sustainable use of resources. Those economies have been affected by centuries of historical injustices, most notably dispossession of lands, territories and resources that, compounded by underlying prejudiced views of indigenous peoples' ways of life, livelihoods and knowledge systems, have undermined their business potential.

4. The systematic economic marginalization of indigenous peoples continues to the present day, including through the discrimination that they frequently face in accessing financial services or in establishing and operating their own businesses. Indigenous women, persons with disabilities and young indigenous persons are particularly affected by discrimination due to the multiple barriers that they face.

5. As restorative frameworks, the United Nations Declaration on the Rights of Indigenous Peoples and several other international human rights instruments guarantee rights that seek to redress the historical injustices suffered by indigenous peoples. Article 3 of the Declaration enshrines indigenous peoples' right to freely pursue their economic, social and cultural development as an integral part of their right to self-determination. Article 23 of the Declaration provides for indigenous peoples' right to development, including the right to determine and develop economic priorities, strategies and programmes. Those provisions underlie indigenous peoples' right to unlock their business potential, do business as an integral part of their right to self-determination, and develop or maintain sustainable economies in their own communities, while also participating in national and regional markets if they wish.

6. The Declaration underlines the particular relevance of indigenous peoples' access to financial services as a way to redress historical injustices and discrimination. In article 4 on self-determination, it clarifies that indigenous peoples require resources to achieve self-determined development. In addition, in article 39, it enshrines the right of indigenous peoples to financial and technical assistance, which should be culturally sensitive and not contribute to dependency relationships with the State, markets or financial institutions.

7. In addressing indigenous peoples' economic marginalization, articles 21 and 22 of the Declaration provide specifically for attention to be paid to the rights of indigenous women, youth and persons with disabilities. Many indigenous peoples suffer from policies of economic forced assimilation that have subjected them to discriminatory and precarious

working conditions. That has put particular pressure on indigenous youth, who often leave their communities to search for work in cities. Indigenous women face similar challenges when combining their unpaid domestic work and paid work in the labour market.

8. The International Labour Organization (ILO) Discrimination (Employment and Occupation) Convention, 1958 (No. 111) is a widely ratified international instrument, grounded in the human rights principle of equal economic opportunities. In interpreting the Convention, the ILO Committee of Experts on the Application of Conventions and Recommendations has reaffirmed the key contribution of indigenous peoples' traditional occupations to addressing their economic marginalization, underlining the importance of access to lands and resources for them to engage in their traditional occupations.¹ ILO has argued that "discrimination in the labour market, by excluding members of indigenous communities from work or by impairing their chances of developing market-relevant capabilities, lowers the quality of jobs they can aspire to".²

9. The international obligation to respect, protect and promote indigenous peoples' traditional economies is similarly enshrined in article 23 of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which provides that "rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development".

10. The right to economic self-determination, including through control over natural resources, is also enshrined in article 1 of the 1986 United Nations Declaration on the Right to Development.

11. Indigenous peoples' right to their economic systems is an enabling right that facilitates the enjoyment and exercise of other rights. The former Special Rapporteur on the rights of indigenous peoples, James Anaya, concluded in his 2013 report on extractive industries and indigenous peoples that the enjoyment of self-determination and related rights may be enhanced when indigenous peoples freely choose to develop their own resource extraction enterprises backed by adequate capacity and internal governance institutions (see A/HRC/24/41, para. 11).

12. The United Nations "Protect, Respect and Remedy" Framework on business and human rights reaffirms that businesses can contribute to the realization of human rights, including the right of those who suffer the most discrimination. Businesses constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights (see A/HRC/8/5, para. 2).

13. However, the Framework fails to pay particular attention to the negative impact that dispossession of land and natural resources has had on indigenous peoples' capacity to do business and become actors of inclusive growth. The Framework also fails to look into potential lessons that could be learned from indigenous peoples' traditional economic models that have enabled them over centuries to balance successfully economic, social, cultural and environmental objectives.

14. The Sustainable Development Goals also establish a link between business, human rights and discrimination-free living conditions for those left furthest behind, including indigenous peoples. Goal 10 on reduced inequalities in income should be broadly understood as including income generated by indigenous peoples from their traditional economies, which deserve equal protection, respect and promotion as sources of income. Goal 8 on sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, is also of key relevance. Indigenous businesses have

¹ See the Committee's direct request to Cambodia. Available from www.ilo.ch/dyn/normlex/en/F?p=normlexpub13100:0:NO:P13100:COMMENT:ID:3254923

² ILO Leaflet No. 5 on discrimination in employment and occupation, p. 1. Available from <http://pro169.org/res/materials/en/discrimination/1.leaflet%20on%20Discrimination%20in%20employ ment%20&%20Occupation.pdf>

much to contribute to the goal of generating employment and ensuring sustainable livelihoods.³

15. The Convention on Biological Diversity also provides recognition of the links between indigenous traditional knowledge, sustainable customary use of biological resources and its wider potential benefits. According to article 8 (j), States shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and promote their wider application with the approval and involvement of the holders of such knowledge, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. Traditional knowledge issues cut across many domains in relation to global environmental issues, including biodiversity conservation, natural resource management, business development, use of genetic resources and climate change.

16. The Paris Agreement acknowledges the role of indigenous peoples' traditional knowledge in addressing climate change (art. 7 (5)) and reminds States to respect, promote and consider their human rights obligations when taking action to address climate change (preamble). Indigenous peoples should therefore have a legitimate stake in climate change-related businesses, funding and financial services.

B. Indigenous peoples' rights-based approaches to business

17. Indigenous peoples' economic systems consist of a diversity of activities for self-determined development. Those activities have traditionally been mostly for subsistence and include small-scale agriculture, hunting, gathering, animal husbandry and artisanal activities such as weaving, carpentry, carving and blacksmithing.⁴ The present section deconstructs indigenous peoples' economies and businesses with a view to understanding the human rights features that make them unique and contribute to their resilience.

1. Indigenous peoples' business as a safeguard for their right to live in dignity

18. Economic redress and empowerment of indigenous peoples and the corresponding right to undertake economic activities is not a goal in itself, but a means for indigenous peoples to attain their right to the dignity and diversity of their cultures, traditions, histories and aspirations, as guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples (art. 15).

19. The right of indigenous peoples to maintain and develop their economic systems and institutions, including the right to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities is enshrined in the Declaration (art. 20), which further provides that indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress (art. 20).

20. The Declaration also requires States to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society (art. 15). That applies to prejudiced views that consider indigenous peoples' use, ownership and occupation of lands and resources as wasteful and economically unworthy.

21. Article 2 of the ILO Indigenous and Tribal Peoples Convention provides for indigenous peoples' economic empowerment as a means for restoring respect for their cultures, customs, traditions and institutions. To that end, States are required to take measures to "promote the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions ... assisting the members of the peoples concerned to eliminate socio-

³ See the submission from the New Zealand Human Rights Commission.

⁴ Jannie Lasimbang, "Indigenous peoples and local economic development", *Global Thinking for Local Development*, vol. 5 (2008). Available from <http://pro169.org/res/materials/en/development/IPs%20and%20Local%20Economic%20Development.pdf>.

economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life".

22. Generally, indigenous peoples' economic activities aim not only at generating resources but also strengthening indigenous cultures, rebuilding communities' self-esteem, breaking systemic barriers of discrimination, protecting their lands and natural resources, reclaiming their place in economic affairs and becoming key actors in their self-determined development.

23. Notwithstanding their considerable diversity, indigenous peoples' economies place a strong emphasis on both social and economic returns to communities. Indigenous peoples' ways of understanding business do not necessarily define success by the amount of profit made, but rather by the benefits that a business can provide to their families and communities.

24. That indigenous notion of corporate social responsibility appears to be grounded in human rights and seems different from the dominant corporate social responsibility model, which is guided by charity, free from binding norms and focused on corporate public image. Indigenous businesses or economic activities are commonly discussed as part of a broader governing strategy for the management of indigenous peoples' lands and natural resources and include the definition of internal agreements regarding the manner and the extent of development of economic activities to avoid severe impacts on the communal way of life.⁵ As noted by former Expert Mechanism member Jannie Lasimbang, "any indigenous economic system is part of an economic and social totality that connects and governs the lives of its peoples. Social responsibility and reciprocity are embedded into behavioral norms within indigenous social systems".⁶ The mainstream globalization-guided business model, which is often criticized for lacking social dimensions,⁷ could learn from indigenous peoples' understanding of businesses grounded in community values and human rights principles.

2. Indigenous peoples' business as a safeguard for their right to lands, territories and resources

25. Indigenous peoples' activities, including those of an economic nature, constitute the core basis for their rights over lands and resources, which they hold not only for themselves but also for future generations. Immemorial use and occupation of lands, territories and resources constitute the primary means of proof of indigenous peoples' rights and claims over a given territory, as substantiated by several court decisions. Article 26 of the Declaration states that rights over lands derive from traditional use and occupation, including for economic purposes.

26. Regional human rights mechanisms have reaffirmed that indigenous peoples' economic activities on their lands and territories, including exploitation or conservation of resources thereon, are constitutive elements of their right to lands. For instance, the Inter-American Court of Human Rights concluded in the *Saramaka* case that:

The right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land...This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected (*Saramaka People v. Suriname*, para. 122).

27. The African Commission on Human and Peoples' Rights reached a similar conclusion, indicating that the Endorois indigenous people's right over their ancestral lands

⁵ See for example, the following initiatives from Brazil: Plano de Gestão do Território Indígena do Xingu (2016), Governança e Bem Viver Indígena: Planos de Gestão Territorial e Ambiental das Terras Indígenas do Alto e Médio Rio Negro, and Plano de Gestão da Terra Indígena Mamoadate.

⁶ Jannie Lasimbang, "Indigenous peoples and local economic development", p. 43.

⁷ See John Ruggie, "Keynote address: United Nations Forum on Business and Human Rights" (14 November 2016). Available from www.ohchr.org/Documents/Issues/Business/ForumSession5/Statements/JohnRuggie.pdf

and resources included their right to undertake economic activities with a view to generating revenues:

The African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands – Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors (*Endorois Welfare Council v. Kenya*, para. 156).

28. The subsistence-focused economic model is still prevalent among many indigenous peoples' communities in Asia, Africa and parts of Latin America and even in developed countries. In parts of Europe, North America, Australia and New Zealand indigenous peoples' economic activities are expanding, as the former Special Rapporteur on the rights of indigenous peoples has said, with "indigenous nations or tribes [owning and operating] companies that engage in oil and gas production, manage electric power assets, or invest in alternative energy" (see A/HRC/24/41, para. 10).

29. Those examples point towards a correlation between the level of legal protection for indigenous peoples' rights over lands or resources and their respective choices of economic models. On the one hand, in countries where their rights over lands and resources are better protected, indigenous peoples tend to be able to develop their economic activities and businesses in a more autonomous manner and also to be more open to innovative business models or partnerships. Protection of indigenous land rights does not necessarily, or even usually, imply "privatization," which can lead to further loss of lands and resources. Rather indigenous lands and resources must be protected according to indigenous traditions and norms, and with domestic remedial mechanisms in cases of violations or abuses of their rights.

30. On the other hand, indigenous communities living in countries where their rights over lands or resources are not protected appear more resistant to innovative business models, which they fear might lead to further alienation of their lands and resources. Lack of legal protection for their lands and resources thus limits their business options.

3. **Indigenous peoples' businesses as a means to achieve enhanced enjoyment of their rights to culture, languages and traditional knowledge**

31. Article 27 of the International Covenant on Civil and Political Rights protects the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture. In its general comment No. 23 (1994) on the rights of minorities, the Human Rights Committee indicates that for indigenous peoples, the right to enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources (para. 3.2).

32. Article 31 of the Declaration protects culture and traditional knowledge-related activities with economic potential, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.

33. The Expert Mechanism's study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples reaffirms the link between culture, land rights and self-determination. The study underlines also the role of languages for indigenous peoples' economic activities grounded in traditional knowledge (see A/HRC/21/53, paras. 23 and 25).

34. Increasing recognition of the importance of indigenous-led entrepreneurship has seen a growing number of indigenous businesses established to enable indigenous peoples to reclaim their place and space in the business world and to promote indigenous modes of

production. For example, Symbiosis, a fashion company in Costa Rica, melds traditional art forms with innovative marketing to appeal to a global market.⁸

35. Culture underpins the social infrastructure of indigenous communities and it can help provide a foundation to support business growth if that is a collective decision. Culture can also provide a number of different business opportunities, particularly in the arts and tourism fields, such as music and dance, arts and craft and the traditional food industry, which can be leveraged to meet indigenous peoples' needs.

36. However, indigenous traditional knowledge systems are susceptible to being commodified and owned and traded as private intellectual property rights. Examples include the misappropriation of traditional knowledge-based genetic resources and products derived from biodiversity-rich ecosystems, for which indigenous peoples often receive little direct benefit. For example, the San people in South Africa contested the use of their traditional knowledge about the plant known as Hoodia, which they have used for centuries to block feelings of hunger, by pharmaceutical companies for medicine including against obesity.⁹ As a positive example, the Plurinational State of Bolivia has established a registry of collective trademarks of indigenous communities' handicrafts and textiles.

37. While Western systems emphasize individual intellectual property, indigenous peoples' traditional knowledge is often created and owned collectively, passed down orally, and regulated by customary laws requiring stewardship for the benefit of the community and future generations. As the Expert Mechanism has previously underlined, existing international mechanisms do little to protect traditional indigenous intellectual property, because they focus on protecting the rights of individuals, not collectives (see A/HRC/30/53, para. 58). The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity addresses traditional knowledge associated with genetic resources and provides provisions for fair and equitable benefit-sharing. However, further strengthening protections around indigenous knowledge systems could help reduce the risk of cultural appropriation and ensure that any culturally based business opportunities benefit indigenous peoples.

4. **Free, prior and informed consent as a catalyst of safe, viable and inclusive indigenous peoples' businesses**

38. The Declaration guarantees a set of rights that should allow indigenous peoples to do business on their lands safely and viably. To that end, article 29 provides for the protection of the environment and productive capacity of indigenous peoples' lands, territories and resources. The article specifically prohibits the storage or disposal of hazardous materials on indigenous peoples' lands without their free, prior and informed consent. Article 32 underlines the particular role of free, prior and informed consent with regard to the development, utilization or exploitation of mineral, water and other resources on indigenous peoples' lands and territories.

39. The principle of free, prior and informed consent has been elaborated upon by numerous human rights experts and mechanisms, including the Expert Mechanism and the Special Rapporteur on the rights of indigenous peoples.¹⁰ Even in cases where indigenous peoples themselves exploit the resources on their lands, free, prior and informed consent would still be of critical importance to ensure that all sections of communities, including indigenous women, youth and persons with disabilities, participate effectively. Free, prior and informed consent thus reinforces the inclusiveness of indigenous peoples' business models.

⁸ Alanay Morales, presentation to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁹ More information on the case can be found at www.wipo.int/export/sites/www/academy/en/about/global_network/educational_materials/cs1_hoodia.pdf.

¹⁰ See, for example, A/HRC/18/42, A/HRC/21/55 and A/HRC/24/41.

40. The human rights-based approach to business by indigenous peoples plays a double role. Upstream, indigenous peoples' businesses help to reclaim their rights and downstream, businesses serve as a tool for enhanced enjoyment of rights by indigenous peoples, including within their own communities by specific social groups, notably indigenous women, youth and person with disabilities.

C. Discrimination-free appreciation of the contribution indigenous peoples' businesses and economies make to national development

41. The Declaration is grounded in equality and seeks to address structural discrimination that affects indigenous peoples, including the non-recognition of their contribution to national economies or societies as a whole. To that end, the preamble to the Declaration reaffirms that all peoples contribute to the diversity and richness of civilizations and cultures, and recognizes that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development.

42. One key facet of the discrimination experienced by indigenous peoples is the stereotyped view that they represent an obstacle to development or that their economic activities do not contribute to the economies of the countries they live in. Indigenous peoples' economic models are often considered wasteful of resources, bound to disappear and "anti-development".

43. Those prejudiced views are grounded in conceptual frameworks that were and continue to be used to justify land dispossession and economic marginalization. They negate the human rights principles of equality and human dignity, which the Declaration upholds by affirming that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust (preamble).

44. Indigenous businesses and traditional livelihoods in fact play an increasingly important role in national economies. In Canada, indigenous businesses contribute approximately Can\$ 12 billion to the economy annually.¹¹ In the United States, over a period of five years, indigenous businesses contributed over US\$ 34.4 billion to the national economy.¹² In New Zealand, the Maori economy is worth an estimated SNZ 40 billion, representing 5.6 per cent of the country's gross domestic product (GDP).¹³ In other countries, however, there is little data assessing the contribution of indigenous peoples to national economies. For instance, pictures of Maasai culture contribute enormously to the Kenyan national economy, considering the wide use of those images as national symbols, including for the Kenyan national airline and tourist industry. In that and other examples, the contribution of indigenous peoples to their national economies remains invisible, which fosters prejudiced views against indigenous peoples' industries, economies and cultures.

45. Globally, it has been estimated that pastoralism provides 10 per cent of the world's meat production.¹⁴ In sub-Saharan Africa, pastoralism, which is often practised by indigenous peoples, accounts for a significant proportion of GDP. For example, pastoralism accounts for 84 per cent of the agricultural GDP in the Niger, 80 per cent of GDP in the Sudan and 50 per cent in Kenya. In Ethiopia, the pastoralist leather industry is the second highest performing industry in terms of foreign trade.¹⁵ The 2010 African Union Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives,

¹¹ See Bert Archer, "The first Indigenous business incubator is coming to Toronto" *Novae* (2 February 2017). Available from <https://novae.ca/en/2017/02/the-first-indigenous-business-incubator-is-coming-to-toronto/>.

¹² See United States Census Bureau Public Information Office, "Facts for Features: American Indian and Alaska Native Heritage Month: November 2012" (Washington D.C., 25 Oct. 2012).

¹³ See Te Puni Kōkiri, *Māori Economy Report 2013* (2015).

¹⁴ See *State of the World's Indigenous Peoples* (United Nations publication, Sales No. 09.VI.13).

¹⁵ *Ibid.*

Livelihoods and Rights of Pastoralist Communities is aimed at reinforcing the contribution of pastoral livestock to national, regional and continent-wide economies.

46. Indigenous economic models are becoming increasingly valued as they offer proven examples of sustainable development. Indigenous peoples' strong affiliation to the natural environment is one of the reasons for their survival and many indigenous peoples are adept at reading early warning signals of global warming and other indicators of environmental change. For the future of the planet, State policies and actions should recognize the important role that indigenous economies and business models play in promoting sustainable development practices.

III. Practices

47. Encouraging practices are emerging from various actors seeking to address discrimination against indigenous peoples' economic activities or businesses, including from indigenous peoples themselves.

A. States

48. States hold primary accountability for providing support to indigenous peoples' economic activities, as stated in article 21 of the Declaration, and are addressing the issue of discrimination against indigenous peoples' businesses or economic activities in different ways, some of which are outlined below.

1. Addressing discrimination against indigenous peoples' businesses through recognition and protection of rights over lands and resources

49. Land rights legislation that has supported indigenous peoples' economic development include the Maori Fisheries Act of 2004 in New Zealand and the Alaska Native Claims Settlement Act of 1971. They illustrate the complexity of enacting legislation to remedy the legacies of dispossession in the modern era. For example, while the latter "settled" vast indigenous land claims in Alaska through substantial monetary payments and title to certain lands, it has been criticized for imposing Western-style corporate models on traditional Alaska Native communities, paving the way for widespread natural resource development by outsiders, and failing to respect indigenous territorial jurisdiction, with mixed results including decades of litigation on indigenous rights to self-governance and other matters. To date, many Alaska Natives continue to suffer high rates of poverty, domestic violence, suicide and other social ills, with some of those problems compounded by the jurisdictional legacy of the Act. Yet, Alaska Native corporations are successful along various metrics. For example, NANA, one of 13 regional corporations created by the Act, has a business arm and subsidiaries that employ more than 15,000 people from around the world and in 2015 had an annual revenue of \$1.6 billion.¹⁶ NANA also emphasizes indigenous values, including cooperation, family, spirituality and hunting, known collectively as "Inupiat Ilitqisat", in its activities.¹⁷

50. Another notable business initiative associated with legislative reform is Moana New Zealand, a Maori fisheries company, established following the Treaty of Waitangi settlements of Maori claims to marine resources. Those legislative settlements, dating back to 1989, also faced their share of criticism and litigation over the question of whether the Government had effectively consulted with Maori pursuant to indigenous governing norms. Yet, by 2007, Maori owned an estimated 40 per cent of the New Zealand seafood industry.¹⁸ Those and other examples demonstrate the economic potential that flows from

¹⁶ See www.nana.com/regional/about-us/nana-faq/.

¹⁷ See <http://nana.com/regional/about-us/mission/values/>.

¹⁸ See Melanie Durette, "Indigenous property rights in commercial fisheries: Canada, New Zealand and Australia compared", Centre for Aboriginal Economic Policy Research (CAEPR) Working Paper No. 42/2008 (Canberra, CAEPR, 2007). See also Erin McKenzie, "Aotearoa Fisheries rebrands to Moana New Zealand to deliver premium Kiwi seafood to the world", *Idealog*, 15 July 2016. Available from

recognition of indigenous peoples' rights to their lands and resources, the challenges of securing effective participation, consultation and consent in those measures, and the necessity of protecting indigenous cultural values and governing structures in contemporary business practices.¹⁹ Joseph Kalt and Stephen Cornell call that the phenomenon of "cultural match" in indigenous economic development, noting that self-determination, effective institutions and internal legitimacy are threshold indicators for successful businesses in indigenous communities.²⁰

51. The African Union's Policy Framework for Pastoralism in Africa highlights the fact that "pastoral development efforts must go beyond single-sector technical approaches, and embrace indigenous knowledge, innovations for sustainable natural resources management, effective governance, and further integration of pastoral livelihoods with expanding market opportunities".²¹ The framework also highlights a number of good practices in Africa, including the recognition by the Government of the Central African Republic of the importance of pastoralists for the national economy, "with subsequent allocation to pastoralist communities of land and appropriate veterinary services".²²

52. In Latin America, the recognition and demarcation of lands has advanced but requires further protection, including through the implementation of indigenous territorial governing plans. The duty of States to consult and seek consent over measures that impact indigenous peoples' lands and rights is also still a key challenge for land rights and human rights protection of indigenous peoples. In Brazil, after a national consultation process, a National Policy on Territorial and Environmental Management of Indigenous Lands was established in 2012 to provide practical measures to guarantee indigenous peoples full possession of their lands after demarcation.²³ To date, the main thrust of the implementation of the policy has been to encourage indigenous communities to draw up their own management plans for lands. Those plans are tools to better identify and reaffirm indigenous governing capacity, economic activities and traditional knowledge and cultural concerns in the use of their territories and natural resources, but are limited by budget cuts. However, if not combined with the advance of the land demarcations that still remain to be carried out, the policy cannot be considered complete.

2. Promoting indigenous peoples' businesses through positive discrimination measures

53. Some States use tax incentives to encourage business development by or with indigenous peoples. For example, individuals and businesses on many Native American territories are partially exempt from certain taxes. In many cases, the exemption arises from the recognition of indigenous nationhood or early treaty settlements. In that situation, indigenous governments are able to implement their own tax regime, including sales taxes, which can be applied to indigenous and some non-indigenous businesses on their land. That has allowed the development of a range of businesses that would not have otherwise taken place.²⁴ Similarly, the Canadian First Nations Fiscal and Statistical Management Act provides authority for First Nations to collect tax. By opting into the tax system under that Act, First Nations are in a better position to promote economic growth and capitalize on business relationships.²⁵ The Whitecap Dakota First Nation is a small community with

<http://idealog.co.nz/venture/2016/07/aotearoa-fisheries-rebrands-moana-new-zealand-deliver-premium-kiwi-seafood-world>.

¹⁹ Urbis, *Enabling Prosperity: success factors in Indigenous economic development* (Sydney, Westpac, 2014).

²⁰ See <http://hpaied.org/publications/sovereignty-and-nation-building-development-challenge-indian-country-today> or <http://hpaied.org/about/overview>.

²¹ African Union, *Policy Framework for Pastoralism in Africa: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities*, p. 3.

²² *Ibid.*, p. 15.

²³ GLZ, "Protection and Sustainable Management of Indigenous Areas in the Amazon" (2014). Available from www.giz.de/en/worldwide/12525.html.

²⁴ Owen Stanley, "The potential use of tax incentives for Indigenous businesses on Indigenous land", CAEPR Working Paper No. 17/2002 (Canberra, CAEPR, 2002).

²⁵ Indigenous and Northern Affairs Canada, "First Nations Fiscal Management Act" (2017). Available from www.aadnc-aandc.gc.ca/eng/1393512745390/1393512934976.

limited access to capital. Under the Act, the community was able to start charging a goods and services tax on fuels, cigarettes and alcohol in order to finance its infrastructure and other needs.⁷⁶

54. Exceptions from trade agreements to provide more favourable conditions to indigenous peoples is another way in which States are supporting indigenous peoples' businesses. A particular example is the Treaty of Waitangi exception, which ensures that the Government of New Zealand has the "flexibility to implement domestic policies that favour Māori without being obliged to offer equivalent treatment to overseas entities".⁷⁷ However, trade agreements in general continue to raise concerns about indigenous peoples' rights, as recently documented by the Special Rapporteur on the rights of indigenous peoples (see A/HRC/33/42).

55. States are also taking measures to facilitate access to credit and other financial services for indigenous peoples, who often face challenges in that regard due to discrimination, geographic isolation or other factors. For example, Australia has a statutory agency, Indigenous Business Australia, that provides grants and loans for indigenous business people who cannot access funding from mainstream banking services. Among other initiatives, the agency supported the development of a set of Indigenous Investment Principles, which provide guidance to indigenous Australians, organizations and communities to develop greater economic resilience and to be strong, active participants in the Australian economy.⁷⁸

56. In Malaysia, agent banking enables consumers in remote areas to obtain banking services through licensed financial institutions operated by third-party agents, such as retail outlets or post offices. Since the introduction of the system in 2012, almost 8,000 agent banks have been established throughout the country.⁷⁹

57. In Mexico, the Commission for the Development of Indigenous Peoples supports the development and improvement of productive processes through the Programme for the Improvement of Indigenous Production and Productivity. The goal is to contribute to the consolidation of productive and tourism projects for indigenous peoples, through their communities or businesses, in order to increase income and promote equality between men and women.⁸⁰

58. Other initiatives to support indigenous business include cash transfers and economic incentives for indigenous activities. Some States are also creating a market for indigenous products through their purchasing power. A number of those types of initiatives to support indigenous peoples' entrepreneurship have been introduced in the Russian Federation. At the regional level, the initiatives include the 2001 law on traditional livelihoods of numerically small indigenous peoples in Khanty-Mansi Autonomous Area, which established state support mechanisms to pay subsidies to indigenous people engaged in traditional indigenous activities, such as reindeer husbandry, horse-breeding, hunting and fishing. Another law in Khanty-Mansi Autonomous Area provides support to organizations that are engaged in the preservation of traditional livelihoods and crafts. In order to be eligible for such support, the organization needs to employ indigenous peoples in its governing bodies, and half of its employees must be of indigenous origin. The organization also needs to derive 70 per cent of its income from traditional forms of economic activities.⁸¹

⁷⁶ See Stelios Louzides and Wanda Wuttunee, *Creating Wealth and Employment in Aboriginal Communities* (Ottawa, Conference Board of Canada, 2005).

⁷⁷ New Zealand, "TPP and Māori Development" (2016), p. 3. Available from www.beehive.govt.nz/sites/all/files/TPP%20%20actsheet%20-%20TPP%20and%20Maori%201%20Jan%202016.pdf

⁷⁸ See the submission from Australia.

⁷⁹ See the statement made by Malaysia at the tenth session of the Expert Mechanism.

⁸⁰ See the submission from Mexico.

⁸¹ Alexey Tsykarev and Natalya Novikova, presentations to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

59. Also in the Russian Federation, the Sakhalin Indigenous Minorities Development Plan has been jointly implemented by the Sakhalin Oblast Administration, the Sakhalin Energy company and the Regional Council of Authorized Representatives of Indigenous Peoples of Sakhalin region. The programme introduced a mechanism of microloans to indigenous peoples so they could develop traditional economic activities. In order to qualify, programme participants are required to submit a business plan for a project that aims to address unemployment among indigenous peoples and suggest traditional economic activities that would be pursued as part of the project. The microloans have been utilized to purchase autonomous energy facilities, information and communications technologies, vehicles, fishing nets and tackle, and certain types of electrical appliances applicable to commercial economic activity.⁵⁹

60. In the Plurinational State of Bolivia, the State has established a "social seal" that certifies products coming from family-based sustainable agriculture. Also, measures targeted specifically at indigenous farmers have been implemented to support and modernize the production of quinoa, rice and corn, among other crops.⁶⁰

5. Promoting indigenous peoples' businesses by ensuring equal and effective access to markets

61. Many States are recognizing that indigenous businesses are viable business models that could make a significant contribution to the economy if given the right support. Due to ongoing structural discrimination, many indigenous people are not on an equal footing with other actors in the market and without special State regulation, successful development of local indigenous economies would not be possible. Recognition of the commercial advantage in supporting indigenous business has been a catalyst for the creation of minority supplier development councils in countries including Australia, Brazil, Canada and the United States.⁶¹ Also in Australia, the federal Government and some state governments have implemented indigenous procurement targets to increase demand for indigenous businesses in government supply chains.⁶² In the United States, legislation allows federally recognized Indian tribes to operate large-scale casino gaming, with significant success for tribes located close to major cities and markets.

62. In Mexico, the National Fund for Indigenous Communities has been in place since 2013, with the aim of widening the coverage of formal financial services in indigenous communities. The Fund promotes financial inclusion as an instrument for economic development and facilitates access to improved credit conditions for indigenous peoples.⁶³

II. Indigenous peoples

63. In the present section, some of the strategies that indigenous peoples are pursuing in order to play a more active role against the discrimination they face in the economic sector are outlined.

64. A number of indigenous not-for-profit economic models are focused on indigenous culture-based industries, with the primary purpose being preservation of indigenous people's cultural heritage and the safeguarding of indigenous peoples' land and resources.⁶⁴

65. At the same time, profit-driven indigenous owned enterprises provide social returns. For example, in Canada the Millbrook Mi'kmaq First Nation, located in first reserve areas in Nova Scotia, has been very successful in pursuing economic independence and has

⁵⁹ See <http://csmdp.com/eng.php?id=44&pid=3>.

⁶⁰ See the statement made by the Plurinational State of Bolivia at the tenth session of the Expert Mechanism.

⁶¹ See House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Open for Business: Developing Indigenous enterprises in Australia* (Canberra, 2008).

⁶² See Hudson, presentation to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁶³ See the submission from Mexico.

⁶⁴ Urbis, *Enabling Prosperity*.

established a number of enterprises that create wealth and employment. Millbrook's biggest business initiative is the Truro Power Centre, a commercial development that has been highly successful in attracting a number of businesses and jobs to the area. Millbrook is using the profits of its enterprise successes to improve services in the community; for example, Can\$ 4 million was provided to build a new administration building and health centre.⁶⁶ Another example is the Sakhalin Aboriginal company in the Poronaysk District in the Russian Federation. During the fishing season, the company employs up to 100 people. The company takes part in addressing social problems experienced by indigenous peoples in Sakhalin, as well as in financing and organizing an annual cultural festival.⁶⁷

66. Joint ventures are particularly common in the extractive industry where indigenous peoples tend to lack the capital to mine their own land. With any joint venture arrangement, there needs to be a regulatory framework in place that recognizes and protects indigenous peoples' rights. Companies need to engage in due diligence and provide a fair and adequate consultation process. An example of an appropriate consultation process that recognizes the rights of indigenous peoples is the Maya Consultation Framework. A primary objective of the framework is that consultations with the Maya people are culturally appropriate and meet international normative standards, particularly the requirement of free, prior and informed consent.⁶⁸ When they can afford it, some indigenous peoples are initiating or taking over extractive industry businesses, including the Southern and Northern Ute tribes in the United States. A number of indigenous peoples reason that if extraction is going to take place anyway, it is preferable if it is an indigenous owned business.

67. Indigenous businesses operate in a variety of sectors, including agriculture, forestry, fishing, arts, technology and tourism. The Ho-Chunk Tribe in the United States, for example, has made a deliberate effort to diversify from casino gaming into other industries ranging from business and health-care products to bottled water and ceremonial supplies. It has also developed housing so that tribal members can both live and work in their indigenous community.

68. In the past two decades, community-based approaches to tourism, such as ecotourism and cultural tourism, have become increasingly popular as a sustainable development approach that provides employment opportunities. However, for indigenous people involved in the tourism industry, the challenge is deciding what aspects of their culture to share without compromising its integrity. It is therefore important that they are provided with the opportunity to authorize any planned tourist activities on their land. With ethnocultural tourism representing one of the most promising spheres of entrepreneurship for indigenous peoples, the VII World Congress of the Finno-Ugric Peoples advised governments of regions inhabited by indigenous Finno-Ugric peoples to establish multidisciplinary educational programmes combining studies related to indigenous languages, business economics and tourism in order to encourage Finno-Ugric indigenous peoples to establish businesses that take advantage of their languages and cultures. The Congress also recommended pursuing partnerships with the World Indigenous Tourism Alliance and relying on the Lankila Declaration on the Development of Indigenous Tourism as guidelines for developing sustainable tourism based on indigenous languages and cultures.⁶⁹

69. The Kalevala District in the Republic of Karelia in the Russian Federation is a promising target area for the development of ethnocultural tourism. The Karelian authorities have taken advantage of the intangible cultural richness of the Kalevala District based on the Kalevala epic poem to introduce various ethnocultural activities. The indigenous peoples of the region are actively running businesses around these activities. However, according to a 2016 study conducted with support from the World Bank, many of

⁶⁶ Escudé and Whittow, *Creating Wealth and Employment in Aboriginal Communities*.

⁶⁷ Natalia Novikova, presentation to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁶⁸ Cristina Cox and Pablo Mui, presentations to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁶⁹ See http://fines2016.fincongress.org/sites/fines2016.fincongress.org/files/4Economy%20and%20Environment_Recommendations_eng.pdf

them operate in the grey market because of a lack of education, the tough taxation policy and numerous inspections.

⁷⁰ In Brazil, extractivism activities have only recently been regulated by the National Indian Foundation and are still a controversial issue for many indigenous peoples and communities due to their significant impact on the environment and on indigenous community life, especially in remote areas. Experiences of economic abuse by private companies or individuals involved in tourism activities have caused internal conflicts and raised communal governing concerns. In 2017, an innovative initiative of community-based tourism jointly managed by indigenous peoples and in accordance with federal legislation, supported by the State, will take place in the Rio Negro region as an assertion of indigenous peoples' self-determination.⁷¹

⁷² Regardless of the type of business indigenous peoples and organizations and operating, having ownership and meaningful control over their own business plays an important role in their well-being and collective dignity. Peer-support networks, such as indigenous chambers of commerce, also help to create a climate for indigenous business through networking and promotional and advisory type activities. For example, in South Africa, Xhosa and San leaders have formed their own chamber of commerce and industry to address their socioeconomic marginalization and to lodge land claims.⁷³

⁷⁴ Cooperatives are another model for business organization used successfully by indigenous peoples across the globe. For example, in Mexico, the Union of Indigenous Communities of the Isthmus Region has united coffee producers from 33 communities, including 9,000 families. They sell their coffee nationally through the fair trade market, and have started a cooperative which provides credit support. In Senegal-Mali, Mameco, a cooperative of indigenous women produces argan oil. By owning their own business and making their own money, they are economically and socially empowered. Cooperatives not only empower indigenous peoples and facilitate their involvement in business, they also promote values of self-help, accountability, equality and solidarity.⁷⁵ Cooperatives have also assisted in securing rights, providing greater opportunities in formal labour markets, and balancing economic and environmental concerns.

⁷⁶ Some indigenous peoples have established their own financial institutions, such as the Traditional Credit Union in the Northern Territory in Australia, the Caisse Populaire Kahnawake in Quebec, Canada and the Muskwa-Coe community in Canada.⁷⁷ When faced with discrimination from banks, the Muskwa-Coe community established its own bank, which now handles Cdn \$42 million and has awarded 2.5 billion to indigenous housing and indigenous businesses.⁷⁸ In Australia, the Traditional Credit Union in the Northern Territory is the only indigenous-owned and operated credit union in Australia. The idea for the Union came from a group of Aboriginal Elders who had experienced disadvantages from the lack of banking and other financial services on their land. The Traditional Credit Union was established with grant funding from the former Aboriginal and Torres Strait Islander Commission and the Arnhemland Progress Association. The first branch was opened in Milngimbi in 1995 and since then, the Union has grown to a network of 15 branches.⁷⁹

C. Financial institutions

⁷⁸ Financial institutions, from local credit unions to multilateral institutions, have a crucial role to play in combating discrimination and facilitating indigenous peoples' access

⁷⁰ See www.dap.gov.br/pt-br/destaques.

⁷¹ *Ministry Rights Group International, State of the World's Indigenous and Indigenous Peoples 2016* (Accessed 20 October 2016).

⁷² See the submission from Cultural Tourism.

⁷³ Louder and Wattanas, *Creating Wealth and Employment in Aboriginal Communities*.

⁷⁴ Grand Chief Wilton Littlechild, presentation to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁷⁵ Little, *Enabling Prosperity*.

to financial services. Article 41 of the Declaration calls upon intergovernmental bodies and institutions to contribute to the full realization of the Declaration through the mobilization, inter alia, of financial cooperation and technical assistance.

75. To that end, the Government of Australia has proposed a global indigenous investment fund, which it argues could help fill the gap in the investment market by providing "targeted, ethical, and culturally sensitive capital investment" to indigenous businesses in developing countries, particularly indigenous women and persons with disabilities at risk from marginalization from mainstream lenders. The suggestion is that the fund could be capitalized with "blended finance" from government, philanthropic and private funding.⁶⁸

76. While the World Bank has no specific funding mechanism for indigenous peoples' businesses, it is currently focusing on community-driven development, which is an approach to local development that empowers community groups with control over planning and investment decisions. The World Bank has established a Dedicated Grant Mechanism for indigenous peoples.⁶⁹ None of the regional development banks for Asia, Africa, Latin America and Europe have such a financing mechanism dedicated to indigenous peoples.

77. National development banks also have a role when investing in sustainable development projects and initiatives aiming to protect the environment in or near indigenous lands and to strengthen indigenous peoples' control over their lands. In Brazil, for example, indigenous peoples, non-indigenous organizations, traditional communities and small scale farmers have established a network covering 13 municipalities for production and commercialization of forest products to protect the Xingu river basin with support from the Fundo Amazonia and the National Sustainable Development Bank.⁷⁰

78. Another form of financial assistance provided to indigenous peoples to support their business aspirations are microfinance loans. Microfinance loans tend to be conceived for people who cannot access mainstream financial services due to low incomes and other disadvantages. They often involve funding from investors from developed countries to entrepreneurs from developing countries. Initially, microfinance loans were heralded as a way to alleviate poverty, however in recent times they have come under increasing scrutiny due to the unscrupulous practices of some lenders who are charging exorbitantly high interest rates. There are however promising practices of indigenous peoples themselves establishing microfinance schemes. For example, in Canada, Waubetek Business Development Corporation is a group of 50 organizations that are owned and managed by Aboriginal Peoples. They provide financing, loans and economic development services to First Nations and Aboriginal Peoples.⁷¹

IV. Challenges

A. Persistent prejudiced views of indigenous peoples' business capacity

79. Indigenous peoples continue to be regarded as high risk borrowers by conventional banks and lending institutions, in part because they may lack credit history. Generally, indigenous peoples have less intergenerational wealth, they do not always have title over their lands and are less likely to own their own home, and therefore often lack collateral for

⁶⁸ See the submission from Australia.

⁶⁹ See E. de Iñáñez-Vasquez, "Urban indigenous peoples: the new frontier" World Bank blog (6 August 2017). Available from <https://blogs.worldbank.org/category/tags/indigenous-peoples>.

⁷⁰ See www.socioambiental.org/pt-br/o-isa/projetos-estrategicos/socioambiental-diversidade-produitiva-mo-xingu.

⁷¹ Barb Nahwegahbow, "Microfinance could be a good fit for Aboriginal people" *Windspeaker*, vol. 31, No. 8 (2013).

securing loans.⁸² In the United States, research found that native business owners often begin with very small amounts of start-up capital. For example, 52 per cent of American Indian and Alaska Native respondents to the 2007 United States Census Survey of Business Owners began their business with less than \$5,000.⁸³

80. The lack of collateral is often exacerbated by some indigenous peoples' remote locations. Lack of communication infrastructure, limited market size and poor economies of scale, coupled with the high cost of living in remote and regional centres, severely narrows business opportunities and makes it difficult to attract qualified employees or convince lenders of business profitability.⁸⁴ There is also a shortage of financial institutions on or near indigenous lands due to their remoteness, which often imposes the existence of third or more parties to intermediate financial services, increasing the costs for indigenous peoples. Access to financial services is further limited by costly and time-consuming transportation. Women face particular challenges as they are often not allowed to hold accounts or borrow money.⁸⁵

81. In Latin America, the persistent prejudiced views against indigenous peoples' business capacity is also evident in the manner in which social and economic programmes and policies are developed and offered to indigenous peoples without targeting specific needs and concerns. Also, compensation and mitigation measures paid to indigenous peoples due to large-scale enterprises rarely consider their business capacity in a full manner and may result in additional social disruption to and cultural impact on indigenous peoples, for example when favouring selected individuals or families to receive benefits rather than investing in sustainable communal initiatives.

82. In many African countries, indigenous peoples practise nomadic pastoralism. There is a general lack of support to that sector of the economy as it is deemed unsustainable and destructive to the environment. Governments are spending huge budgets on other sectors of agriculture in the form of incentives such as fertilizer subsidies and insurance policies while neglecting pastoralism, which has nevertheless proven to be a viable livelihood activity.

B. Lack of legal protection for rights over lands and resources

83. Indigenous peoples are often not recognized as legal owners of their lands, which may limit collateral when applying for a loan. Many lending institutions do not consider collective land ownership as equivalent to individual land titles. Private companies and financial institutions tend to simplify communal ownership and title to meet their own interests. For example, in the Amazon region there have been a number of speculative offers by private companies to buy the right to sell carbon credits from indigenous lands. A number of contracts for those purposes were considered void because they would be restricting collective use of land for traditional activities for 30 years or more to benefit a private entity.⁸⁶

84. Furthermore, in many cases, resources on and under indigenous peoples' lands are considered to be State-owned. Globally, indigenous peoples' rights to their natural resources are restricted, particularly when it comes to subsoil resources. Even in cases where indigenous peoples do have legal title deeds to their lands, the land is often leased to mining companies with little or no consultation with indigenous people. For example, most ore production in Sweden comes from mines in Sápmi, the Sámi traditional area.⁸⁷

⁸² Miriam Jorgensen, "Access to capital and credit in Native Communities" (Tucson, Arizona: Native Nations Institute, 2017). Available from http://nni.arizona.edu/application/files/8914/6386/8578/Accessing_Capital_and_Credit_in_Native_Communities.pdf

⁸³ *Ibid.*, p. 38.

⁸⁴ *Ibid.*

⁸⁵ See the submission from Cultural Survival.

⁸⁶ See <http://g1.globo.com/natureza/noticia/2012/03/finai-considera-nulas-vendas-de-terra-indigena-para-estrangeiros.html>

⁸⁷ See the preparatory report from the Sami Parliament in Sweden/Sámediggi/Sámedigge/Sámedigkie/Sámedinget for the Special Rapporteur on the rights of indigenous peoples prior to her 2015 visit to

However, there is still no agreement or legislation that formalizes the implementation of the principle of free, prior and informed consent, despite various treaty body recommendations and comments in general and to Sweden, specifically, on that subject.

85. In Norway, the lack of implementation of the right to self-governance in traditional businesses and livelihoods, such as Sámi reindeer herding, coastal fisheries, sea and river salmon fishing and spring duck hunting, is a major challenge. State management of indigenous Sámi reindeer herding under the Norwegian Reindeer Herding Act of 2007, particularly the State's right to decide on the obligatory reduction of the number of reindeer each Sámi herder can own, has recently been challenged in courts. Enforced decimation of Sámi reindeer herders' herds through State management bodies for reindeer herding must be in accordance with international human rights standards, particularly the right to property under the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights).

86. Those challenges undermine indigenous peoples' business capacities and opportunities. For example, the restrictions put on indigenous peoples' ability to protect and benefit from their land and resources constitutes one of the main obstacles to real economic development among First Nations, Métis and Inuit in Canada. Due to the loss of their land and limitations set by the various levels of government on how they can use and benefit from their land and natural resources, indigenous peoples in Canada have become increasingly dependent on welfare provided by federal or provincial governments.¹⁰ When indigenous peoples cannot access general financial credits for improving or ensuring their crops due to lack of recognition of land rights, there is a growing dependency on welfare.¹¹ Such dependency is sometimes being unfairly used to justify the lack of demarcation of indigenous lands as a supposed indicator of the lack of capacity of indigenous peoples to use their traditional lands.

C. Lack of inclusive indigenous governance and leadership in business

87. A number of human rights-related challenges facing indigenous peoples' businesses are linked to their communities' structures and institutions. Having an enabling environment for businesses in indigenous communities is often contingent on social stability and legitimate governance structures. Without those internal governance arrangements it can be difficult for communities to control disparate interests and to have the necessary stability to instil investment confidence.

88. Alongside effective governance structures, indigenous communities and business leaders also need to have a clear corporate vision that is inclusive, taking into account specific types of discrimination faced by certain groups within communities. Economic development initiatives are more likely to be successful when they are indigenous-led and when leaders have a clear vision that aligns market needs and opportunities with community capacity. Indigenous communities in which successful enterprises have been developed tend to have leaders who have assessed the business possibilities available to the community in consultation with community members.

89. Therefore, initiatives to strengthen self-governing institutions, particularly those related to the use or management of land and resources and that also consider social and

¹⁰ *Sápmi and Sweden*. Available from www.sametinget.se/92639. See also *Minerals and Mines in Sápmi: the Unexplored of the Swedish Sámi Parliament*, 2014. Available from <https://www.sametinget.se/87915>.

¹¹ See *State of the World's Indigenous Peoples*.

¹² In 2016, 112,081 indigenous families accessed the Bolsa Família, whereas in 2010, the number was 66,168. See Fany Ricardo and Hery Ricardo, eds., *Povos Indígenas no Brasil, 2011-2016* (São Paulo: Instituto Socioambiental, 2017). See also www1.bolivia.mil.com.br/poder/2016/09/1810078-bolsa-familia-altera-regras-de-indigenas-na-regiao-do-sangu-dimil.

economic development, are key to preventing internal and external conflicts when defining economic activities or indigenous business.⁶⁰

D. Challenges facing indigenous women, youth and persons with disabilities

90. Overall, there is a lack of research into the experience of female indigenous entrepreneurship. However, what evidence there is suggests that women are more risk adverse and more likely to start a business out of necessity than men. Indigenous female entrepreneurship is often a reaction to lack of opportunity in the labour market for females (displaced opportunity).⁶¹ Evidence from the World Bank's Regional Programme on Enterprise Development supports that view, suggesting that indigenous women's marginal social position acts as a driving force to become self-employed.⁶² One of the challenges is how to articulate the value that women bring to the economy, both formally and informally. There is a strong social bias about what indigenous women are capable of and what sort of industry they should work in, with very little in the way of business mentorship available for indigenous women in many countries.⁶³ Indigenous women are also frequently excluded from the labour market, or are employed informally with salaries below legal norms and without social protection. Furthermore, indigenous women often bear a double burden of household work in addition to their work outside the home.

91. In African countries, indigenous women entrepreneurs have more difficulty than male entrepreneurs in obtaining credit. That has been attributed to the small size of their businesses, as well as the lack of collateral offered by entrepreneurs. Public sector banks are often focused on government expenditure, while the private banks are oligopolistic in nature and concentrate on minimizing risk.⁶⁴

92. In Canada, a recent study was conducted in order to find ways to empower indigenous women to become entrepreneurs.⁶⁵ The Government of Canada is directly assisting women to become entrepreneurs, with 25 per cent of recipients of the Canadian Indigenous Entrepreneurship System being indigenous women.⁶⁶

93. In Mexico, a recent study found that the financial system and the traditional banking sector are not inclusive in terms of providing credit and other financial services. The lack of financial services within reach of vulnerable sectors, including women, young persons and indigenous persons, has contributed to inequality and hampers their ability to exercise other rights, such as the rights to food, housing, work, health and education.⁶⁷

94. Indigenous persons with disabilities are among the most disadvantaged people in the world, although there is insufficient data worldwide on that subset of the indigenous population. They often experience multiple barriers to taking part in meaningful activities, particularly in relation to employment and business activities. Young indigenous people aged 15-24 face additional challenges in establishing business enterprises due to their age and the lack of intergenerational wealth they inherit compared to other young non-

⁶⁰ See, for example, *Governança e Bem Viver Indígena: Planos de Gestão Territorial e Ambiental das Terras Indígenas do Alto e Médio Rio Negro*, vol. 2, p. 8. Available from https://issuu.com/instituto-socioambiental/docs/governanca_2_pgs_01a24_web.

⁶¹ Sonya Pearce, "Indigenous women and entrepreneurship in New South Wales, Australia", PhD dissertation, University of Technology, Sydney Business School, 2015.

⁶² Wim A. Naude and J.J.D. Havenga, "An overview of African entrepreneurship and small business research", in Leo-Paul Dana and Robert B. Anderson, eds., *International Handbook of Research on Indigenous Entrepreneurship* (Cheltenham, United Kingdom, Edward Elgar Publishing Limited, 2007), pp. 28-45.

⁶³ Laurie Buffalo, presentation to the expert seminar on good practices and challenges for indigenous peoples' entrepreneurship.

⁶⁴ Naude and Havenga, "An overview of African entrepreneurship and small business research".

⁶⁵ See "Creating a new narrative: empowering indigenous women through entrepreneurship", Available from www.impaktcorp.com/wp-content/uploads/2017/06/Creating-a-New-Narrative-1.pdf.

⁶⁶ See the statement made by Canada at the tenth session of the Expert Mechanism.

⁶⁷ See the submission from Mexico.

indigenous peoples.⁶⁸ As a result, reducing poverty by supporting business enterprise is particularly pertinent to young indigenous people.

⁶⁸ See "The financial economy and indigenous young people in Australia" Available from www.csi.edu.au/media/uploads/FNF_Final_Report_-_23-3-16_tGwaz9Z.pdf

Annex

Expert Mechanism advice No. 10 on indigenous peoples' businesses and access to financial services

1. States should adopt legal and policy frameworks that recognize, promote and protect rights that allow indigenous peoples, if they so wish, to operate businesses on their lands safely and viably. Such measures should be developed with the effective participation of indigenous peoples, as provided for in the United Nations Declaration on the Rights of Indigenous Peoples.
2. When developing and implementing national action plans to achieve the ends of the Declaration, pursuant to the outcome document of the World Conference on Indigenous Peoples (General Assembly resolution 69/2), States should include measures aiming to ensure that no undue obstacles are in place for indigenous peoples to access financial services free of discrimination and pursue business activities if they wish to do so.
3. States should take measures to ensure that indigenous peoples, particularly indigenous persons with disabilities, indigenous women and indigenous youth, do not suffer from discrimination in their attempts to access financial services. Support should also be provided to business activities being undertaken by those groups.
4. Secure land tenure is essential for indigenous peoples to become engaged in business activities and access financial services. States should therefore ensure protection for indigenous peoples' rights to their lands, territories and resources and take measures to protect and promote indigenous peoples' economic activities, recognizing that those activities are constitutive elements of their rights to lands and resources. States should not turn to "privatization" regimes, but rather ensure that indigenous legal traditions regarding land, governance and business are recognized within the national legal framework.
5. States should take measures to protect indigenous peoples' rights relating to culture and traditional knowledge-related activities. That should include both facilitating indigenous peoples' involvement in economic activities linked to the arts and tourism, and protecting indigenous peoples from the misuse or misappropriation of their cultural heritage and traditional knowledge. In that regard, States, in partnership with indigenous peoples, should continue to pursue the development of international instruments that ban cultural appropriation.
6. Laws that prohibit or limit sustainable indigenous hunting, fishing, traditional farming or gathering traditions should be revised or amended in order to facilitate the development by indigenous peoples of locally based businesses in those sectors.
7. States should recognize indigenous peoples' contributions to development, and combat frequently held prejudices and stereotyped views of indigenous peoples as representing an obstacle to development. That is particularly crucial in cases where such views are used to justify land dispossession and economic marginalization. Furthermore, State policies and actions should recognize the important role that indigenous economies and business models can play in promoting sustainable development practices.
8. States should consider targeted measures to encourage and facilitate indigenous peoples' involvement in business and their access to financial services. Those measures can include tax incentives, programmes to facilitate access to credit, programmes to promote financial literacy, and subsidies or cash transfers to promote traditional economic activities. However, States should not misuse that financial support in order to put pressure on or interfere with the decision-making processes of indigenous communities.
9. States should provide safety net measures for indigenous businesses, including protection against hostile competition.

10. States should ensure that statistical data on employment and traditional livelihoods of indigenous peoples are available at all levels. Those data can guide the design and implementation of support measures and programmes for indigenous entrepreneurship.
 11. The use of indigenous languages in business activities should be enabled, and indigenous peoples should have access to information on financial services in their own languages.
 12. In cases where indigenous peoples themselves, in exercising their self-determination, decide to exploit resources on their lands, the principle of free, prior and informed consent should still be respected in order to ensure that all sectors of the communities involved participate effectively.
 13. Indigenous peoples should consider establishing peer support networks to facilitate exchange of experiences and networking relating to their participation in business and their access to financial services.
 14. Financial institutions, including intergovernmental banks, should devise financial products and services that are accessible to indigenous peoples and considerate of their perspectives in business.
 15. Indigenous peoples, States and financial institutions should work together to support viable and sustainable economies in indigenous communities, so that indigenous persons have the opportunity and option to work, live and raise families on their own lands and territories, while also participating in national and regional markets to the extent that they wish to do so.
 16. States should work with indigenous peoples and others to ensure that business and financial activities, including legislative measures pertaining to indigenous economic development, are undertaken with attention to indigenous peoples' self-determination, institution-building and cultural legitimacy, as well as best practices in relationships with communities and partners.
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